CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 32 AUGUST 26, 1998 NO. 34

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decision

(T.D. 98–68)

REVOCATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Broker license revocation.

Notice is hereby given that the Commissioner of Customs, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Parts 111.52 and 111.74 of the Customs Regulations, as amended (19 CFR 111.52 and 111.74), is canceling the following Customs broker licenses without prejudice.

Port	*Individual*	*License #*
Seattle	C & Y International	11796
New York	J. D. Smith Customs Brokers, Inc.	04853
New York	JCM Air Sea, Ltd.	10061
New York	Import Express Services, Inc.	13517
Dallas	Ericson, Inc.	11815

Dated: August 10, 1998.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, August 13, 1998 (63 FR 43444)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, August 12, 1998.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF WIRING HARNESS FOR USE WITH ULTRASONIC SCANNING APPARATUS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS), of a wiring harness designed solely for use with ultrasonic scanning apparatus. Customs invites comments on the correctness of the proposed revocation.

DATE: Comments must be received on or before September 25, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue,

N.W., Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927–0760.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification of a wiring harness designed solely for use with ultrasonic scanning apparatus. Customs invites comments on the correctness of the proposed revocation.

In *NY* A89005, dated December 11, 1996, a wiring harness used solely with ultrasonic scanning apparatus was held to be classifiable in subheading 8544.51.80, HTSUS, as other electric conductors, for a voltage exceeding 80 V but not exceeding 1,000 V, fitted with connectors. This ruling was based on a finding that the wiring harness met the tariff description under this subheading. *NY* A89005 is set forth as "Attachment A" to this document.

It is now Customs position that because of its construction, this wiring harness is classifiable in subheading 8544.20.00, HTSUS, as coaxial cable and other coaxial electric conductors. This provision is believed to be more specific than the one in subheading 8544.51.80, HTSUS. *HQ* 961830 revoking *NY* A89005 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: August 6, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
New York, NY, December 11, 1996.

CLA–2–85:RR:NC:1: 112 A89005
Category: Classification
Tariff No. 8544.51.8000

MR. TOM CADE
NORTH AMERICAN MANUFACTURING CORPORATION
777 East MacArthur Circle
Tuscon, AZ 85714

Re: The tariff classification of a wiring harness from Mexico.

DEAR MR. CADE:

In your letter dated November 13, 1996 you requested a tariff classification ruling.

As indicated by the submitted photographs, the wiring harness consists of an insulated electrical cable with several connectors attached at one end and a single connection device at the other end. As you indicate in your request, this harness is used in an ultrasonic scanning apparatus.

The applicable tariff provision for the wiring harness will be 8544.51.8000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for other electric conductors, for a voltage exceeding 80 V but not exceeding 1,000 V; fitted with connectors other than the modular telephone type. The general rate of duty will be 4.2 percent *ad valorem*. For merchandise entered for consumption, or withdrawn from warehouse for consumption, on or after January 1, 1997, the general rate of duty will be 3.7 percent *ad valorem*.

You have proposed classification under subheading 9018.12.0000, HTSUSA, based upon Legal Note 2(b), Section XVIII. However, Legal Note 2(a), Section XVIII, states, in part, that articles of Chapter 85 are to be classified in that heading. Accordingly, classification under subheading 9018.12.0000, HTSUSA, is precluded.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 CFR 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist David Curran at 212–466–5680.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 961830 JAS
Category: Classification
Tariff No. 8544.20.00

MR. RUDY A. PINA
JOFFROY CUSTOMS BROKERS, INC.
P.O. Box 698
Nogales, AZ 85628–0698

Re: *NY* A89005 Revoked; wiring harness for use with ultrasonic scanning apparatus; teflon-coated stranded copper surrounded by outside conductor; coaxial electric conductor; other electric conductors fitted with connectors, Subheading 8544.51.90; Chapter 90, Note 2, HTSUS; GRI 6; *HQ* 088496.

DEAR MR. PINA:

In a letter, dated April 28, 1998, on behalf of **North American Manufacturing Corporation (NAMCO)**, you request reconsideration of *NY* A89005, which the Director, Customs Commodity Specialist Division, New York, issued to **NAMCO** on December 11, 1996. This ruling held that an insulated electrical cable with several connectors attached at one end and a single connector attached at the other end was classifiable in subheading 8544.51.80 (now 90), Harmonized Tariff Schedule of the United States (HTSUS), as other electric conductors for a voltage exceeding 80 V but not exceeding 1,000 V, fitted with connectors. We have reconsidered this ruling and now believe that it is incorrect.

Facts:

The article in issue, referred to as a wiring harness, was described as consisting of an insulated electrical cable with several connectors attached at one end and a single connector attached at the other end. The ruling requester stated it was solely for use with ultrasonic scanning apparatus of the type provided for in HTS heading 9018.

A submitted sample, designated 171–0614–00/13155, is a 7-foot cable consisting of multiple Teflon-coated copper wires surrounded by a braided outside metallic conductor called a "serve." The entire cable is further encased in rubber. The copper wires at each end, with tips bared, are evenly spaced in plastic ferrules which you refer to as programmable integrated circuits.

You cite several lexicographic sources in support of the contention that this article is in fact a coaxial cable or coaxial electric conductor of heading 8544. Notwithstanding its special construction, which you state dedicates it solely for use with apparatus of heading 9018, in your opinion it is still classifiable as a coaxial cable, in subheading 8544.20.00, HTSUS.

The provisions under consideration are as follows:

8544	Insulated wire, cable (including coaxial cable) and other insulated electric conductors, whether or not fitted with connectors; * * *:
8544.20.00	Coaxial cable and other coaxial electric conductors
	Other electric conductors, for a voltage exceeding 80 V but not exceeding 1,000 V:
8544.51	Fitted with connectors:
8544.51.80 (now **90**)	Other
* * * * * * *	
9018	Instruments and appliances used in medical, surgical, dental or veterinary sciences * * *, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof:
9018.12.00	Ultrasonic scanning apparatus
	Other instruments and appliances and parts and accessories thereof:
9018.90.80	Other

Issue:

Whether the electric cable in issue is a coaxial cable of heading 8544.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 3(a) states, in part, that goods which are, *prima facie*, provided for under two or more headings, shall be classified in the heading which provides the most specific description. GRI 6 states, in part, that in considering subheadings within the same heading, only subheadings at the same level are comparable.

In accordance with Chapter 90, Note 2, HTSUS, parts and accessories which are goods included in any of the headings of this chapter or of chapter 84, 85 or 91 are in all cases to be classified in their respective headings. *See* Note 2(a). Other parts and accessories are to be classified with the machines, instruments or apparatus with which they are solely or principally used. *See* Note 2(b).

The **Harmonized Commodity Description and Coding System Explanatory Notes** (**ENs**) constitute the official interpretation of the Harmonized System. Though not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and Customs believes the **ENs** should always be consulted. *See* T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Relevant **ENs** at p. 1521 state, in part, that provided they are insulated, heading 8544 covers electric wire, cable and other conductors used as conductors in electrical machinery, apparatus or installations. Goods of heading 8544 may be in the form of single or multiple strand insulated wire or two or more insulated wires assembled together in a common insulating sheath. Such goods are made up of a single or multiple-strand conductor, one or more coverings of insulating material, and in certain cases a metal sheath (e.g., lead, brass, aluminum or steel) which serves, among other things, as a supplementary conductor in certain co-axial cables. The cable, designated 171–0614–00/13155, conforms to this description. Coaxial security system sensor cables of substantially similar construction were held to be classifiable as coaxial cable in subheading 8544.20.00, HTSUS. *See HQ* 088496, dated April 12, 1991, and lexicographic authorities cited.

Holding:

In accordance with Chapter 90, Note 2(a), HTSUS, the cable designated 171–0614–00/13155, is a good included in heading 8544. This precludes any parts claim in heading 9018 from consideration.

Under the authority of GRI 3(a), applied at the subheading level by GRI 6, the cable is classifiable in subheading 8544.20.00, HTSUS, as the provision for coaxial cable and other coaxial electric conductors provides a more specific description for this cable than does the provision for other electric conductors, for a voltage exceeding 80 V but not exceeding 1,000 V, fitted with connectors.

NY A89005, dated December 11, 1996, is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

REVOCATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF THE CHEMICAL COMPOUND "THYMIDINE"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking four rulings pertaining to the tariff classification of the chemical compound thymidine (CAS # 50–89–5) under the Harmonized Tariff Schedule of the United States (Annotated) (HTSUSA). Notice of the proposed revocation was published on July 1, 1998, in Volume 32, Number 26 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after October 26, 1998.

FOR FURTHER INFORMATION CONTACT: Michael McManus, General Classification Branch, (202) 927–2346.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 1, 1998, Customs published a notice in the CUSTOMS BULLETIN, Volume 32, Number 26, proposing to revoke four ruling letters pertaining to the tariff classification of thymidine. No comments were received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking four rulings pertaining to the tariff classification of thymidine (CAS # 50–89–5).

In Headquarters Ruling Letters (HQ) 950133, issued on August 3, 1993, and HQ 955129, issued December 16, 1994, as well as New York Ruling Letters (NY) A82783, issued April 30, 1996, and NY A87265, issued October 8, 1996, Customs ruled that thymidine was classified in subheading 2938.90.0000, HTSUSA, the residual provision for glycosides.

Upon review of these rulings and consideration of recent amendments to Harmonized Commodity Description and Coding System Explanatory Note (EN) 29.38, Customs has determined that the above classification is in error. This product should be classified in subheading 2934.90.9000, HTSUSA, the provision for "nucleic acids and their salts; other heterocyclic compounds:other:other:other:other."

EN 29.38 states, in reference to heading 2938, HTSUSA, "this heading also excludes: (1) nucleosides and nucleotides (heading 29.34)." A nucleoside is a compound "containing a purine or pyrimidine base linked to either D-ribose, forming ribose, or D-deoxyribose," Hawley, *Condensed Chemical Dictionary*, 10th edition. "A purine or pyrimidine base in glycosidic linkage with the sugar forms a *nucleoside* (e.g. adenosine, thymidine, *q.v.*)." *The Merck Index*, 12th edition, at 1156. Both of these definitions describe thymidine, which consists of thymine (a pyrimidine derivative) linked to D-deoxyribose. Thus, thymidine is a nucleoside and should, according to EN 29.38, be classified in heading 2934, HTSUSA, rather than heading 2938, HTSUSA.

Within heading 2934, HTSUSA, thymidine is best classified in the six-digit subheading 2934.90, the residual subheading, as thymidine contains neither an unfused thiazole ring, a benzothiazole ring-system, nor a phenothiazine ring-system. At the ten-digit level, thymidine is properly classified in subheading 2934.90.9000, HTSUSA, because it is not an aromatic compound, is not a drug, nor is it listed in the *eo nomine* provisions of subheading 2934.90.7000, HTSUSA.

Customs is revoking HQ 950133, HQ 955129, NY A82783 and NY A87265 to reflect the proper classification of thymidine. Proposed Headquarters Ruling Letters (HQ) 961901, 961902, 961903, and 961904 revoking HQ 950133, HQ 955129, NY A82783, and NY A87265, respectively, are set forth as Attachments A through D to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: August 7, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, August 7, 1998.

CLA–2 RR:CR:GC 961901 MGM
Category: Classification
Tariff No. 2934.90.9000

PORT DIRECTOR
U.S. CUSTOMS SERVICE
One Virginia Ave.
Wilmington, NC 28401

Re: Thymidine (CAS # 50–89–5); Revocation of HQ 950133.

DEAR SIR:

This office has determined that Headquarters Ruling Letter (HQ) 950133, issued to your office on August 3, 1993, in response to Protest No. 1503–90–000037 concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of thymidine (CAS # 50–89–5), is in error. Therefore, this ruling revokes HQ 950133 and sets forth the correct clasification of thymidine. The entries involved in HQ 950133, which were presumably liquidated in accordance with that decision, are not affected by the revocation.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2186), notice of the proposed revocation was published on July 1, 1998, in Volume 32, Number 26 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

Facts:

In HQ 950133, Customs ruled that thymidine, entered in 1989–1990 by Burroughs-Wellcome Co., was classified in subheading 2938.90.0000, HTSUSA, the provision for glycosides other than rutoside.

Upon review of this and other rulings classifying this merchandise, Customs has discovered an error in the classification of thymidine. This product should be classified in subheading 2934.90.9000, HTSUSA, the provision for "nucleic acids and their salts; other heterocyclic compounds: other: other: other: other.

Issue:

Whether thymidine is classified under the provision for glycosides, or the provision for nucleic acids and other heterocyclic compounds.

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUSA. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUSA and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUSA, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUSA. *See*, T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

This matter is governed primarily by GRI 1, in that the choice in classification is between two headings. Heading 2938, HTSUSA, provides for "Glycosides, natural or reproduced by synthesis, and their salts, ethers, esters and other derivatives" while heading 2934, HTSUSA, provides for "Nucleic acids and their salts; other heterocyclic compounds."

EN 29.38 states, in reference to heading 2938, HTSUSA, "this heading also excludes: (1) nucleosides and nucleotides (heading 29.34)." A nucleoside is a compound "containing a purine or pyrimidine base linked to either D-ribose, forming ribose, or D-deoxyribose," Hawley, *Condensed Chemical Dictionary*, 10th edition. "A purine or pyrimidine base in glycosidic linkage with the sugar forms a *nucleoside* (e.g. adenosine, thymidine, *q.v.*)." *The Merck Index*, 12th edition, at 1156. Both of these definitions describe thymidine, which consists of thymine (a pyrimidine derivative) linked to D-deoxyribose. Thus, thymidine is a nucleoside and should, according to EN 29.38, be classified in heading 2934, HTSUSA, rather than heading 2938, HTSUSA.

Within heading 2934, HTSUSA, thymidine is best classified in the six-digit subheading 2934.90, the residual subheading, as thymidine contains neither an unfused thiazole ring, a benzothiazole ring-system, nor a phenothiazine ring-system. At the ten-digit level, thymidine is properly classified in subheading 2934.90.9000, HTSUSA, because it is not an aromatic compound, is not a drug, nor is it listed in the *eo nomine* provisions of subheading 2934.90.7000, HTSUSA.

This is consistent with the classification of uridine in subheading 2934.90.9000, HTSUSA, in NY A84837, dated June 25, 1996. Uridine is similar to thymidine, differing only in that uridine lacks a methyl group on its pyrimidine base and has a sugar group of ribose rather than deoxyribose. Uridine is described as a "nucleoside" by the *Merck Index*.

Holding:

Thymidine is classified in subheading 2934.90.9000, HTSUSA with a 1998 general column one duty rate of 6.8% *ad valorem*.

HQ 950133 is revoked. In accordance with 19 U.S.C. § 1625 (c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10 (c)(1), Customs Regulations [19 CFR 177.10 (c)(1)].

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 7, 1998.
CLA–2 RR:CR:GC 961902 MGM
Category: Classification
Tariff No. 2934.90.9000

MR. RAJU SHAH
OMNICHEM
1025 Charlelo Lane, # 109
Elk Grove Village, IL 60007–3258

Re: Thymidine (CAS # 50–89–5); Revocation of HQ 955129.

DEAR SIR:

This office has determined that Headquarters Ruling Letter (HQ) 955129, issued to you on December 16, 1994, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of thymidine (CAS # 50–89–5), is in error. Therefore, this ruling revokes HQ 955129.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2186), notice of the proposed revocation was published on July 1, 1998, in Volume 32, Number 26 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

Facts:

In HQ 955129 Customs ruled that thymidine was classified in subheading 2938.90.0000, HTSUSA, the provision for glycosides other than rutoside.

Upon review of this ruling, Customs has discovered an error in the classification of thymidine. This product should be classified in subheading 2934.90.9000, HTSUSA, the provision for "nucleic acids and their salts; other heterocyclic compounds: other: other: other: other.

Issue:

Whether thymidine is classified under the provision for glycosides, or the provision for nucleic acids and other heterocyclic compounds.

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUSA. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUSA and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUSA, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUSA. *See*, T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

This matter is governed primarily by GRI 1, in that the choice in classification is between two headings. Heading 2938, HTSUSA, provides for "Glycosides, natural or reproduced by synthesis, and their salts, ethers, esters and other derivatives" while heading 2934, HTSUSA, provides for "Nucleic acids and their salts; other heterocyclic compounds."

EN 29.38 states, in reference to heading 2938, HTSUSA, "this heading also excludes: (1) nucleosides and nucleotides (heading 29.34)." A nucleoside is a compound "containing a purine or pyrimidine base linked to either D-ribose, forming ribose, or D-deoxyribose," Hawley, *Condensed Chemical Dictionary*, 10th edition. "A purine or pyrimidine base in glycosidic linkage with the sugar forms a *nucleoside* (e.g. adenosine, thymidine, *q.v.*)." *The Merck Index*, 12th edition, at 1156. Both of these definitions describe thymidine, which consists of thymine (a pyrimidine derivative) linked to D-deoxyribose. Thus, thymidine is a nucleoside and should, according to EN 29.38, be classified in heading 2934, HTSUSA, rather than heading 2938, HTSUSA.

Within heading 2934, HTSUSA, thymidine is best classified in the six-digit subheading 2934.90, the residual subheading, as thymidine contains neither an unfused thiazole ring, a benzothiazole ring-system, nor a phenothiazine ring-system. At the ten-digit level, thymidine is properly classified in subheading 2934.90.9000, HTSUSA, because it is not an aromatic compound, is not a drug, nor is it listed in the *eo nomine* provisions of subheading 2934.90.7000, HTSUSA.

This is consistent with the classification of uridine in subheading 2934.90.9000, HTSUSA, in NY A84837, dated June 25 1996. Uridine is similar to thymidine, differing only in that uridine lacks a methyl group on its pyrimidine base and has a sugar group of ribose rather than deoxyribose. Uridine is described as a "nucleoside" by the *Merck Index*.

Holding:

Thymidine is classified in subheading 2934.90.9000, HTSUSA with a 1998 general column one duty rate of 6.8% *ad valorem*.

HQ 955129 is revoked. In accordance with 19 U.S.C. § 1625 (c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10 (c)(1), Customs Regulations [19 CFR 177.10 (c)(1)].

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, August 7, 1998.

CLA–2 RR:CR:GC 961903 MGM
Category: Classification
Tariff No. 2934.90.9000

MS. JOAN VON DOEHREN
INTERCHEM CORPORATION
120 Route 17 North
P.O. Box 1579
Paramus, NJ 07653–1579

Re: Thymidine (CAS # 50–89–5); Revocation of NY A82783.

MS. VON DOEHREN:

This office has determined that New York Ruling Letter (NY) A82783, issued to you on April 30, 1996, concerning the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of thymidine, (CAS # 50–89–5) is in error. Therefore, this ruling revokes NY A82783.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2186), notice of the proposed revocation was published on July 1, 1998, in Volume 32, Number 26 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

Facts:

In NY A82783, Customs ruled that thymidine was classified in subheading 2938.90.0000, HTSUSA, the provision for glycosides other than rutoside.

Upon review of this ruling, Customs has discovered an error in the classification of thymidine. This product should be classified in subheading 2934.90.9000, HTSUSA, the provision for "nucleic acids and their salts; other heterocyclic compounds: other: other: other: other.

Issue:

Whether thymidine is classified under the provision for glycosides, or the provision for nucleic acids and other heterocyclic compounds.

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUSA. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUSA and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUSA, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUSA. *See*, T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

This matter is governed primarily by GRI 1, in that the choice in classification is between two headings. Heading 2938, HTSUSA, provides for "Glycosides, natural or reproduced by synthesis, and their salts, ethers, esters and other derivatives" while heading 2934, HTSUSA, provides for "Nucleic acids and their salts; other heterocyclic compounds."

EN 29.38 states, in reference to heading 2938, HTSUSA, "this heading also excludes: (1) nucleosides and nucleotides (heading 29.34)." A nucleoside is a compound "containing a purine or pyrimidine base linked to either D-ribose, forming ribose, or D-deoxyribose,"

Hawley, *Condensed Chemical Dictionary*, 10th edition. "A purine or pyrimidine base in glycosidic linkage with the sugar forms a *nucleoside* (e.g. adenosine, thymidine, *q.v.*)." *The Merck Index*, 12th edition, at 1156. Both of these definitions describe thymidine, which consists of thymine (a pyrimidine derivative) linked to D-deoxyribose. Thus, thymidine is a nucleoside and should, according to EN 29.38, be classified in heading 2934, HTSUSA, rather than heading 2938, HTSUSA.

Within heading 2934, HTSUSA, thymidine is best classified in the six-digit subheading 2934.90, the residual subheading, as thymidine contains neither an unfused thiazole ring, a benzothiazole ring-system, nor a phenothiazine ring-system. At the ten-digit level, thymidine is properly classified in subheading 2934.90.9000, HTSUSA, because it is not an aromatic compound, is not a drug, nor is it listed in the *eo nomine* provisions of subheading 2934.90.7000, HTSUSA.

This is consistent with the classification of uridine in subheading 2934.90.9000, HTSUSA, in NY A84837, which was issued to you on June 25, 1996. Uridine is similar to thymidine, differing only in that uridine lacks a methyl group on its pyrimidine base and has a sugar group of ribose rather than deoxyribose. Uridine is described as a "nucleoside" by the *Merck Index*.

Holding:

Thymidine is classified in subheading 2934.90.9000, HTSUSA with a 1998 general column one duty rate of 6.8% *ad valorem*.

NY A82783 is revoked. In accordance with 19 U.S.C. § 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

MARVIN AMERNICK
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, August 7, 1998.

CLA-2 RR:CR:GC 961904 MGM
Category: Classification
Tariff No. 2934.90.9000

MR. A.J. SPATARELLA
KANEMATSU USA INC.
114 West 47th Street, 23rd Floor
New York, NY 10036

Re: Thymidine (CAS # 50-89-5); Revocation of NY A87265.

MR. SPATARELLA:

This office has determined that New York Ruling Letter (NY) A87265, issued to you on October 8, 1996, concerning the classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of thymidine (CAS # 50-89-5), is in error. Therefore, this ruling revokes NY A87265 and sets forth the correct classification of thymidine.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057, 2186), notice of the proposed revocation was published on July 1, 1998, in Volume 32, Number 26 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

Facts:

In NY A87265, Customs ruled that thymidine was classified in subheading 2938.90.0000, HTSUSA, the provision for glycosides other than rutoside.

Upon review of this ruling, Customs has discovered an error in the classification of thymidine. This product should be classified in subheading 2934.90.9000, HTSUSA, the provision for "nucleic acids and their salts; other heterocyclic compounds: other: other: other: other.

Issue:

Whether thymidine is classified under the provision for glycosides, or the provision for nucleic acids and other heterocyclic compounds.

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUSA. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUSA and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUSA, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUSA. *See*, T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

This matter is governed primarily by GRI 1, in that the choice in classification is between two headings. Heading 2938, HTSUSA, provides for "Glycosides, natural or reproduced by synthesis, and their salts, ethers, esters and other derivatives" while heading 2934, HTSUSA, provides for "Nucleic acids and their salts; other heterocyclic compounds."

EN 29.38 states, in reference to heading 2938, HTSUSA, "this heading also excludes: (1) nucleosides and nucleotides (heading 29.34)." A nucleoside is a compound "containing a purine or pyrimidine base linked to either D-ribose, forming ribose, or D-deoxyribose," Hawley, *Condensed Chemical Dictionary*, 10th edition. "A purine or pyrimidine base in glycosidic linkage with the sugar forms a *nucleoside* (e.g. adenosine, thymidine, *q.v.*)." *The Merck Index*, 12th edition, at 1156. Both of these definitions describe thymidine, which consists of thymine (a pyrimidine derivative) linked to D-deoxyribose. Thus, thymidine is a nucleoside and should, according to EN 29.38, be classified in heading 2934, HTSUSA, rather than heading 2938, HTSUSA.

Within heading 2934, HTSUSA, thymidine is best classified in the six-digit subheading 2934.90, the residual subheading, as thymidine contains neither an unfused thiazole ring, a benzothiazole ring-system, nor a phenothiazine ring-system. At the ten-digit level, thymidine is properly classified in subheading 2934.90.9000, HTSUSA, because it is not an aromatic compound, is not a drug, nor is it listed in the *eo nomine* provisions of subheading 2934.90.7000, HTSUSA.

This is consistent with the classification of uridine in subheading 2934.90.9000, HTSUSA, in NY A84837, dated June 25, 1996. Uridine is similar to thymidine, differing only in that uridine lacks a methyl group on its pyrimidine base and has a sugar group of ribose rather than deoxyribose. Uridine is described as a "nucleoside" by the *Merck Index*.

Holding:

Thymidine is classified in subheading 2934.90.9000, HTSUSA with a 1998 general column one duty rate of 6.8% *ad valorem*.

NY A87265 is revoked. In accordance with 19 U.S.C. § 1625 (c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10 (c)(1), Customs Regulations [19 CFR 177.10 (c)(1)].

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

R. Kenton Musgrave

Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

(Slip Op. 98–109)

PILLSBURY CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–03–00161

[On cross motions for summary judgment, plaintiff seeks a ruling that defendant's revocation of plaintiff's Exporter's Summary Procedure authority and "blanket waiver" privileges was arbitrary, capricious, not in accordance with law, and void *ab initio*. *Held:* Plaintiff's motion for summary judgment granted. Defendant's motion for summary judgment denied.]

(Dated July 29, 1998)

Neville, Peterson & Williams (John M. Peterson and George W. Thompson) for plaintiff.
Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(G. Michael Harvey)*; of counsel: *Susan Flood*, Assistant Regional Counsel, United States Customs Service for defendant.

OPINION

MUSGRAVE, *Judge:* This action is before the Court on cross motions for summary judgment. Plaintiff, The Pillsbury Company ("Pillsbury"), contests the revocation by defendant, United States Customs Service ("Customs"), of its authority to file claims for manufacturing and same condition drawback using the "Exporter's Summary Procedure" ("ESP"). Pillsbury also contests Customs' revocation of a "blanket waiver" of pre-export notification requirements.

BACKGROUND

Pillsbury is a United States corporation that produces, manufactures, imports and exports a wide range of fresh, frozen and processed food products. In the course of its import-export business, Pillsbury claims direct identification and substitution drawback on various products. "Drawback" is the refund or remission of customs duties paid on goods imported into the United States and used in the manufacture or production of goods which are then exported, or used in exchange for imported merchandise of the same kind or quality. 19 U.S.C. § 1313 (1988);

19 C.F.R. § 191 (1993). Pillsbury requested, and, by letter dated March 22, 1985, received, permission from Customs to file claims for manufacturing and same condition drawback using the expedited procedure known as the "Exporter's Summary Procedure," which allows an eligible drawback claimant to combine multiple shipments on a single drawback claim. 19 C.F.R. § 191.53 (1993). Pillsbury secured another tool for improving efficiency in its drawback procedures when it received, also by letter on March 22, 1985, a "blanket waiver" of the regulatory requirement that it furnish Customs with a five working days' advance notice of the exportation of goods that will be the subject of a same condition drawback claim. *See* 19 C.F.R. § 191.141(b)(2)(ii) (1993).

By letter dated November 3, 1992, Customs revoked Pillsbury's ESP authority and blanket waiver. The letter informed Pillsbury that its ESP and waiver privileges had been revoked effective September 15, 1992, and that it would be required to submit notice of intent to claim drawback five days prior to the exportation of drawback-eligible goods, effectively revoking its blanket waiver as well. The letter stated that the revocation was solely due to an on-going investigation of the company and that Pillsbury could not reapply for ESP authority until completion of the investigation. Pillsbury filed an administrative appeal and, upon Customs' denial of that appeal, commenced the instant action on March 16, 1993.

In addition to filing a summons and complaint, Pillsbury filed a motion for a preliminary injunction to enjoin Customs from revoking Pillsbury's ESP authority and blanket waiver during the pendency of the action. Before the Court acted upon this motion, Customs sent another letter to Pillsbury altering the original revocation letter. On April 2, 1993, Customs wrote Pillsbury that its ESP authorization and blanket waiver would be restored for all products other than fresh asparagus, but that the revocation would be converted to a suspension to remain in effect until July 1, 1993. This Court acted upon Pillsbury's motion on May 4, 1993, issuing an Order that established expedited pre-exportation procedures for Customs to inspect Pillsbury's exports including asparagus. This Order prevented Customs from effecting its November 3, 1993 letter purporting to revoke Pillsbury's ESP authority and blanket waiver.

On September 28, 1993, Customs issued another letter, without leave of the Court, revoking Pillsbury's ESP authority and blanket waiver, but only as to exports of fresh asparagus. Customs asserted in this letter that Pillsbury's drawback claims as to asparagus would be invalid due to a lack of fungibility between Pillsbury's exported asparagus and asparagus which Pillsbury had previously imported from Mexico.

In light of Customs' attempts at another revocation, this Court heard arguments from the parties on enjoining Customs' latest actions and issued a second Order on November 10, 1993. The Order confirmed the procedures established by the May 4, 1993 Order and extended them to include drawback claims on exports of fresh asparagus up to and includ-

ing September 28, 1993. *Pillsbury Co. v. United States*, 17 CIT 1195 (1993). This Court did not rule on the question of the fungibility of Pillsbury's asparagus imports and exports, nor was there a decision on the merits of Pillsbury's drawback claims for the periods during which Customs prevented Pillsbury's use of ESP. *Id* at 1197.

This Court's May 4, 1993, and November 10, 1993, Orders mooted Pillsbury's drawback claims as to exports made after their issuance. There remains, however, a contested issue between the parties as to the export of fresh asparagus during the time between Customs' November 3, 1992 letter and the Court's May 4, 1993 Order (hereinafter the "gap period"). Customs refuses to grant drawback on Pillsbury's asparagus exports for the gap period on the grounds that Pillsbury did not provide Customs with five days' pre-export notification. Pillsbury submitted the summary judgment motion now before the Court in an effort to have the November 3, 1992 revocation declared void *ab initio* and proceed to trial on the merits of its drawback claims for asparagus exports during the gap period. Customs contests Pillsbury's motion with a request for summary judgment seeking to uphold its actions and dismiss Pillsbury's claims.

Standard of Review

The Court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(i)(4) (1988). By statute, the Court must set aside actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A)–(D) (1988). The Court must also strike down agency action which is contrary to constitutional, statutory, or procedural requirements. 28 U.S.C. § 2640(e) (1988).

Both parties have moved for summary judgment. Summary judgment is proper when "there is no genuine issue as to any material fact and * * * the moving party is entitled to judgment as a matter of law." USCIT R. 56(d); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). The Court finds that there are no genuine issues of material fact and that it has the power to render summary judgment.

Discussion

The sole issue before the Court is whether Customs' revocation of Pillsbury's ESP authority and blanket waiver was valid. Pillsbury argues that Customs' revocation violated the Administrative Procedure Act ("APA"), Customs' own binding rules, and Pillsbury's constitutional due process guarantees. Pillsbury calls upon the Court to reiterate a conclusion contained in its previous Order: that Customs' revocation did not provide Pillsbury with adequate notice nor was it predicated on a charge which Pillsbury could rebut in a meaningful way. *Pillsbury*, 17 CIT at 1196 n.2. The Court agrees with Pillsbury that Customs' actions were arbitrary and capricious, and holds Customs' revocation to be void *ab initio*.

Customs granted Pillsbury ESP and blanket waiver authority in its 1985 letter pursuant to valid Customs regulations. Pillsbury argues

that in bestowing these privileges, Customs granted Pillsbury licenses as defined, and protected, by the APA. The APA sets forth the definition of "license" and establishes the parameters within which an agency may grant and revoke licenses. The APA defines "license" as "an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." 5 U.S.C. § 551(8) (1988). Courts have found that the APA provides a very broad definition of "license" and have extended APA protection to several privileges highly analogous to those granted Pillsbury. *Atlantic Richfield Co. v. United States*, 774 F.2d 1193, 1199–1202 (D.C. Cir. 1985) (Maritime Administration approvals for conditional entry in Alaskan-Panama Canal domestic oil trade held to be APA-protected licenses); *Gallagher & Asher Co. v. Simon*, 687 F.2d 1067, 1072–76 (7th Cir. 1982) (permits issued pursuant to Customs regulations allowing for expedited entry of certain imports constituted licenses under the APA); *American Customs Brokers Co. v. United States*, 10 CIT 385, 637 F. Supp. 218 (1986) (immediate delivery privileges found to be a license under the APA). The Court finds that Pillsbury's ESP authority and waiver privileges constituted a license within the protections of the APA.

Customs argues that ESP authority and waiver privileges cannot be licenses because to cloak these in the protection of the APA would be to deprive Customs of its right to examine goods for export in an effort to discover and prevent fraud. Customs suspected that Pillsbury was filing fraudulent drawback claims on exports of asparagus; thus the cryptic phrase in Customs' November 3, 1992 letter to Pillsbury that its privileges were being revoked due to an on-going investigation. Customs asserts that it has a plenary right to inspect all exports and that if ESP authority, and more particularly the ability to waive pre-export notification pursuant to the duly granted blanket waiver, are considered licenses then suspect goods can be removed from Customs territory before an investigation could be effected.

Customs' argument is inapposite. The policy concern Customs puts forth is irrelevant to the question of whether the ESP authority and blanket waiver privileges are licenses for APA purposes. Customs was never dispossessed of the opportunity to deny any of Pillsbury's drawback claims on the merits.[1] Additionally, Customs, in the 1985 letter granting Pillsbury ESP authority and waiver privileges, explicitly reserved to itself the right to inspect Pillsbury's merchandise at the discretion of the District Director. The waiver privilege only applies to the notice Pillsbury must provide to Customs and in no way interfered with Customs' ability to inspect or investigate Pillsbury's exports.

While the Court agrees that Customs has the right to inspect exports it also has an obligation to operate within statutory mandates. The obligation established by the APA requires Customs to notify an exporter

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[1] It is still the claimant's responsibility to prove eligibility for drawback, and Pillsbury is seeking nothing more than its day in court to do so. Customs at this stage is proposing arguments which do no more than attempt to deny Pillsbury the opportunity to be heard, and the Court disapproves of that attempt.

of the reason for revocation of a license and to provide the exporter an opportunity to address that reason. The APA states:

> * * * the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—
>
> (1) notice by the agency in writing of the facts or conduct which may warrant action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

5 U.S.C. § 558(c). This section affords a party with a "second chance" to address and correct any concerns with the license in question. *American Customs Brokers*, 10 CIT at 388, 637 F. Supp. at 222 (quoting *Gallagher & Asher Co.*, 687 F.2d at 1074–75). Customs' November 3, 1992 letter was by its terms a revocation of Pillsbury's ESP authority and blanket waiver privileges. The revocation letter itself constituted the first appraisal by Customs to Pillsbury that its privileges were in jeopardy, and this is insufficient notice under the APA. Further, the letter did not identify a means by which Pillsbury would be afforded an opportunity to address or rebut the vaguely stated reason for the revocation, denying Pillsbury the opportunity for the "second chance" that the APA guarantees.

Customs argues that it need not comply with the strictures of § 558(c) if it determines that there has been a willful violation of statutory or regulatory requirements. 5 U.S.C. § 558(c); *Koden v. United States*, 564 F.2d 228, 234 (7th Cir. 1977). Customs believed that Pillsbury had intentionally filed inaccurate drawback claims. Customs' revocation was apparently based on that belief, although the revocation letter informed Pillsbury only that there was an "on-going investigation."

To be exempt from § 558(c) mandates, Customs must show that it made an actual finding of intentional misconduct and that there is no reasonable dispute that intentional misconduct occurred. *Holt Hauling & Warehousing System, Inc. v. United States*, 10 CIT 769, 772, 650 F. Supp. 1013, 1016 (1986) ("Absent a *finding* of willfulness, the licensee is entitled to written notice of the facts warranting" revocation (emphasis added)); *American Customs Brokers Inc.*, 10 CIT at 389, 637 F. Supp. at 223 ("Unless the charge of willfulness cannot be reasonably disputed, the statutory scheme requires [Customs], at some time close to the time of revocation, to advise plaintiff of the basis of the willfulness claim, in sufficient detail for plaintiff to confront it"). Customs did neither. The revocation letter did not provide Pillsbury with any details of alleged misconduct, and the fact that no evidence of improper conduct on the part of Pillsbury was at that time or since forthcoming makes it clearly disputable whether intentional misconduct occurred. Since Pillsbury had no opportunity to rebut whatever evidence Customs may have had, Customs cannot claim an exemption from the demands of § 558(c). As Customs met neither of the two requirements under that section, and

Customs' actions do not fit within any exception, the Court finds that Customs' attempted revocation violates the APA.

Customs' own policy directives with respect to ESP authority set forth the APA-required procedures which Customs should have followed in this case. Customs Directive 3740–007 (April 21, 1992) (hereinafter "Directive") established "uniform national" grounds for revoking a drawback claimant's ESP authorization, and the Directive's requirements mirror those of APA Section 558(c). The Directive first describes potential conditions which could be cause for revocation of ESP authority and, by implication, blanket waiver privileges, then explicitly states what actions Customs must take to effect a revocation of either.

> If it is decided to deny a request for ESP or to revoke ESP privileges, a letter to that effect will be sent to the claimant explaining what corrective action must be taken, *but not disclosing any restricted enforcement information*. [The letter must also include] a time frame in which the applicant/claimant may reapply.

Customs Directive 3740–007 Section 3(c) (emphasis in original). The Directive also authorizes appeal of the denial or revocation decision. Most importantly, the above paragraph mandates that Customs provide a claimant with notice of a revocation decision, sufficient details of the reason for revocation with which to formulate a response, and an opportunity to present that response, just as APA Section 558(c) requires.

Customs describes this rule of its own making as a "directive," but this label is "only indicative, and not dispositive, of the agency's intent" to formulate a rule. *Louisiana-Pacific Corp. v. Block*, 694 F.2d 1205, 1210 (9th Cir. 1982). The Directive easily falls within the APA's definition of a "rule," which is defined as:

> the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency * * *.

5 U.S.C. § 551(4) (1988). The Directive was issued pursuant to Customs' statutory authority to promulgate rules in furtherance of its authority to grant drawback in the administration of customs laws. 19 U.S.C. § 1313 (1988); *see Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03, 99 S. Ct. 1705, 1718 (1979) (agency regulations are deemed substantive, and thus binding on the agency and parties before it, when issued pursuant to statutory authority and affecting individual rights and obligations). By its own terms, the Directive was designed to "establish uniform national policies and procedures for approving, denying, and revoking Exporter's Summary Procedure (ESP) for manufacturing and same condition drawback claimants." Customs Directive 3740–007. The Court finds that the Directive is indeed a rule affecting individual rights that are protected by procedural safeguards.

Although the Directive is a rule, it does little more than that which is already required by the APA, and Customs did little to satisfy either. The existence of an "on-going investigation" is not one of the reasons listed

in the Directive for revocation of ESP authority, but the list is clearly not intended to be exhaustive. Rather, the critical aspect of the Directive is its demand that, in conformity with the APA, certain procedural safeguards be followed in the act of revocation. The Court finds that Customs' failure to abide by both APA Section 558(c) and its own policy mandate—one which is not for the benefit of the administrating district directors but rather intended for the benefit of authorized ESP claimants—was arbitrary and capricious, and therefore void *ab initio*.

Finally, Pillsbury argues that Customs' actions violated Pillsbury's constitutional due process guarantees. In *American Customs Brokers*, the court found that Customs, in revoking plaintiff's license, failed to comply with APA notice and "second chance" requirements, just as Customs has in this case. However, in so finding, the *American Customs Brokers* court also found that it need not reach the constitutional due process question:

> The court need not decide * * * whether [Customs'] conduct was within constitutional bounds inasmuch as Customs apparently has failed to comply with section 558(c). Thus, the court finds a sufficient likelihood of success in establishing lack of statutory due process in discontinuing [plaintiff's license].

American Customs Brokers, 10 CIT at 390, 637 F. Supp. at 223 (footnote omitted). Thus, this Court does not reach the constitutional due process issue. The Court, like that in the aforementioned case, deems it sufficient to find that Customs has violated the APA and its own rule-established procedural requirements in revoking Pillsbury's license to use ESP and a blanket waiver. The Court notes that this ruling has the sole effect of allowing Pillsbury to move to trial to attempt to demonstrate its eligibility for drawback on asparagus exports during the gap period.

CONCLUSION

For the foregoing reasons, the Court finds that Customs' attempted revocation of Pillsbury's ESP authority and blanket waiver privileges is void *ab initio*.

(Slip Op. 98–110)

AMERICAN SILICON TECHNOLOGIES, ELKEM METALS CO., GLOBE METALLURGICAL, INC., AND SKW METALS & ALLOYS, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND COMPANHIA FERROLIGAS MINAS GERAIS-MINASLIGAS AND ELETROSILEX BELO HORIZONTE, DEFENDANT-INTERVENORS

Court No. 96–10–02313

[Plaintiffs move for judgment on the agency record challenging the final results of the second administrative review of the antidumping order on silicon metal from Brazil. Defendant and defendant-intervenors oppose the motion for judgment on the agency record but consent to remand on one issue. *Held:* The Court remands the final results with respect to the consented issue and affirms all other issues.]

(Dated July 30, 1998)

Baker & Botts, L.L.P. (William D. Kramer and Martin Schaefermeier) for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *(John K. Lapiana);* of counsel: *Betsy Seastrum,* Senior Counsel; *David R. Mason, Jr.,* Office of Chief Counsel, Import Administration, U.S. Department of Commerce for defendant.

Bishop & Wallace (Wayne S. Bishop) for defendant-intervenor.

Dorsey & Whitney (Phillippe M. Bruno) for defendant-intervenor.

OPINION

MUSGRAVE, *Judge:* Plaintiffs, American Silicon Technologies, Elkem Metals Company, Globe Metallurgical, Inc., and SKW Metals & Alloys, Inc. (collectively "American Silicon"), move for judgment upon the agency record contesting the final results of the second administrative review of the antidumping order on silicon metal from Brazil. *Silicon Metal From Brazil; Final Results of Antidumping Duty Administrati[ve] Review,* 61 Fed. Reg. 46,763 (1996) *("Final Results").* American Silicon requests that the Court: (1) remand the U.S. Department of Commerce's ("Commerce") interest income calculations for respondents Companhia Brasileira Carbeuto de Calcio ("CBCC") and Eletrosilex Belo Horizonte ("Eletrosilex"); and (2) affirm *Silicon Metal From Brazil: Amended Final Results of Antidumping Duty Administrative Review,* 62 Fed. Reg. 47,441 (1997) *("Amended Final Results")* as to all other issues.

BACKGROUND

Subsequent to the filing of American Silicon's motion, nine (9) of the initial fourteen (14) alleged errors were corrected by Commerce in its *Amended Final Results.*[1] With respect to four additional issues, American Silicon now agrees with Commerce that no calculation errors were

[1] The *Amended Final Results* were issued in response to this Court's order remanding the case to Commerce for correction of ministerial errors. In its reply brief, American Silicon correctly points out that additional ministerial errors in the *Amended Final Results* were subsequently corrected by Silicon Metal From Brazil, Redetermination on Remand, Consideration of September 18, 1997 Ministerial Error Allegations, Court No. 96–10–02313 (November 25, 1997).

committed. The sole issue before the Court is whether Commerce properly calculated interest income for CBCC and Eletrosilex. As to this issue, the parties agree that a remand is necessary.

STANDARD OF REVIEW

In reviewing antidumping determinations, the Court "shall hold unlawful any determination, finding, or conclusion found * * * to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd, Ceramica Regiomontana, S.A. v. United States*, 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987) (citations omitted).

DISCUSSION

American Silicon alleges that Commerce deviated from established practice and made determinations unsupported by substantial evidence on the record when Commerce calculated interest income for CBCC and Eletrosilex. The Court agrees.

In calculating the net financial expenses included in cost of production and constructed value, Commerce generally "subtract[s] from total financial expenses only interest income derived from short-term investments * * *." Br. in Supp. of Pls.' Mot. for J. Upon the Agency R. at 8; Def.'s Am. Mem. in Partial Opp'n to Pls.' Mot. for J. Upon the Agency R. at 6 ("Def.'s Am. Mem."). *See also, Certain Stainless Steel Wire Rods From France: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 7206, 7213 (1997); *Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above From the Republic of Korea*, 58 Fed. Reg.15,467, 15,473 (1993). However, in this case, Commerce admits that it failed to determine whether its interest income calculations for CBCC and Eletrosilex were based solely upon short-term investments.

"It is 'a general rule that an agency must either conform itself to its prior decisions or explain the reasons for its departure * * *.'" *Hussey Cooper, Ltd. v. United States*, 17 CIT 993, 997, 834 F. Supp. 413, 418 (1993) (quoting *Citrusuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988)). When the Court finds that an agency has departed from past practice without an adequate explanation for the basis of the departure, the agency's determination must be rejected.

By failing to ensure that its interest income calculations were limited to short-term investments, the Court finds that Commerce departed from past practice and made offsets unsupported by substantial evidence on the record. This issue is therefore remanded to Commerce. Upon remand, Commerce shall ensure that any reduction of reported interest expenses for CBCC and Eletrosilex is based upon income specif-

ically derived from short-term investments. The Court affirms the *Amended Final Results* as to all other issues.

CONCLUSION

Therefore, upon reading plaintiffs' Motion for Judgment Upon the Agency Record, defendant's response thereto, and upon due consideration of all other papers and proceedings had herein, the Court hereby remands the *Amended Final Results* as to Commerce's calculation of CBCC's and Eletrosilex's interest income. All other issues are affirmed.

(Slip Op. 98–111)

UNITED STATES, PLAINTIFF *v.* MAXI SWITCH, INC., DEFENDANT

Court No. 97–08–01426

[Defendant's motion to dismiss denied.]

(Decided August 4, 1998)

Frank W. Hunger, Assistant Attorney General of the United States; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *A. David Lafer*, Senior Trial Counsel; *Franklin E. White, Jr.*, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, for Plaintiff.

Piper & Marbury L.L.P., (*John L. Moore* and *David P. Langlois)* for Defendant.

OPINION

POGUE, *Judge:* The United States Customs Service ("Customs") commenced this action against Defendant, Maxi Switch, Inc. ("MSI"), to recover civil penalties for violation of section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (1988), alleging grossly negligent conduct concerning the importation of certain video game cartridges. This Court has jurisdiction pursuant to 28 U.S.C. § 1582(1) (1994).

Defendant's motion to dismiss is before the Court. Defendant alleges that (1) Customs denied MSI administrative due process and (2) Customs failed to exhaust administrative remedies. Accordingly, Defendant's motion falls under USCIT R. 12(b)(5) as a motion to dismiss for failure to state a claim upon which relief can be granted. *See* USCIT R. 12(b)(5).

STANDARD OF REVIEW

In a proceeding for the recovery of a monetary penalty claimed by the United States under section 1592, "all issues, including the amount of the penalty, shall be tried de novo." 19 U.S.C. § 1592(e)(1) (1988). In the context of a motion to dismiss for failure to state a claim, the court assumes that "all well-pled factual allegations are true," construing "all reasonable inferences in favor of the nonmovant," *Gould, Inc. v. United*

States, 935 F.2d 1271, 1274 (Fed. Cir. 1991); and inquires whether the complaint sets forth facts sufficient to support a claim. To determine the sufficiency of a claim, consideration is limited to the facts stated on the face of the complaint, documents appended to the complaint and documents incorporated in the complaint by reference. *Allen v. Westpoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991).[1]

BACKGROUND

The first entry of the subject merchandise was filed on September 4, 1992. On July 29, 1996, Customs issued a draft pre-penalty notice to MSI, alleging that MSI violated section 1592. Shortly thereafter MSI made both written and oral responses to Customs' draft pre-penalty notice. On October 17, 1996, Customs issued a pre-penalty notice to MSI, indicating a tentative culpability level of fraud with a corresponding penalty of $32,394,473.[2] The notice stated that MSI had undervalued merchandise and failed to declare certain dutiable assists.

> From August 1, 1992 through December 31, 1993, [MSI] entered * * * 136 Customs entries * * * by means of material false statements and omissions * * *. Further, [MSI] failed to declare certain dutiable assists involving 136 entries. The total loss of revenue [due] to the alleged undervaluation of the integrated circuits and dutiable assists is $679,343.

Def.'s Aff. Supp. Mot. to Dismiss ("Def.'s Aff.") Ex. 1 at 2 (unpaginated). MSI responded to the pre-penalty notice on November 12, 1996.

On December 9, 1996, Customs issued a penalty notice. In response, MSI submitted a petition for remission on January 8, 1997. In the petition, MSI stated, "[a]s to the substance of the notice, we hereby incorporate by reference our submission of November 12, 1996 in response to Customs' prepenalty notice." *See id.* Ex. 3. On February 24, 1997, Customs permitted counsel for MSI to make an oral presentation concerning MSI's January 8th petition for remission.

On February 28, 1997, Customs issued an amended pre-penalty notice. The amended notice, pursuant to 19 U.S.C. 1592(d),[3] "assesse[d] additional unpaid duties in the amount of $53,852.51."[4] Def.'s Aff. Ex. 4. The notice also alleged negligence or gross negligence as an alternative to the "tentative determination" of fraud. *Id.* at 2. Customs required a written response in seven days, by March 7, 1997.

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[1] The Court's conclusions are not meant to limit review of Customs' actions in any subsequent proceeding.

[2] Section 1592 defines three possible levels of culpability: fraud, gross negligence, or negligence. "A fraudulent violation * * * is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise." 19 U.S.C. § 1592(c)(1). The $32,394,473 amount represents the domestic value of the subject merchandise in this case. Def.'s Aff. Supp. Mot. to Dismiss ("Def.'s Aff.") Ex. 2 at 5–9 (unpaginated).

[3] Section 1592 states in pertinent part, "if the United States has been deprived of lawful duties as a result of a violation of subsection (a) of this section, the appropriate customs officer shall require that such lawful duties be restored, whether or not a monetary penalty is assessed." 19 U.S.C. 1592(d).

[4] The parties disagree as to what the $53,852.51 represents. MSI describes this duty as "the first time [Customs] specified the amount of duties allegedly lost due to certain undeclared assists." Def.'s Mem. P. & A. Supp. Mot. to Dismiss ("Def.'s Brief.") at 2–3. In other words, MSI views the $53,852.51 as the total loss of revenue from the undeclared assists alleged in the original penalty notice. Customs, however, views it as "an *additional* demand for duties * * * [that] involved the same violations as the original pre-penalty notice." Pl.'s Mem. Opp'n to Def.'s Mot. Dismiss ("Pl.'s Brief") at 2 (emphasis added). That is, the $53,852.51 is assessed in addition to the alleged unreported assists included in the $679,343. For the purposes of a motion to dismiss, where all inferences must be made in favor of the non-moving party, the Court assumes the facts as alleged by Customs to be true.

The complaint states that MSI received the amended pre-penalty notice on March 3, 1997.[5] Customs did not provide notification by telephone of the issuance of the amended notice.[6]

MSI responded to the amended pre-penalty notice by fax and regular mail, denying fraudulent behavior and, pursuant to regulations, requesting a statement of how Customs calculated the $53,852.51.[7]

Customs issued an amended penalty notice on March 14, 1997. This notice specified how Customs calculated the additional $53,852.51 and repeated Customs' demand that that amount be paid. Response was required in 7 days, by March 21, 1997. Customs did not give notification by telephone.

The complaint states that MSI received the amended penalty notice on March 17, 1997.[8] MSI responded to the complaint on March 20, 1997 by petitioning for remission or mitigation of the penalty.[9] At that time, MSI also paid $53,852.51, stating, "[s]uch payment is without prejudice to any of [MSI's] legal rights and may not be construed as an admission of liability for any penalty." Def.'s Aff. Ex. 7. In addition, MSI requested the opportunity to make an oral presentation. MSI contends it never received a response to the March 20, 1997 petition. Def.'s Mem. P. & A. Supp. Mot. to Dismiss ("Def.'s Brief.") at 4. Customs does not challenge this contention.

On March 21, 1997, Customs issued a decision in response to MSI's January 8, 1997 petition for remission. The decision stated that MSI was guilty of gross negligence and assessed a penalty of $2,887,517.76,[10] on the condition that $53,852.51 remained deposited as withheld duties. Customs required compliance within fifteen days, by April 5, 1997.

On March 31, 1997, Customs referred this matter to the Department of Justice. MSI submitted a supplemental petition on April 11, 1997, pursuant to 19 C.F.R. § 171.33(a).[11]

DISCUSSION

I. Administrative Due Process

MSI argues that it was deprived of administrative due process as (1) the seven day period provided to respond to Customs' amended pre-penalty and penalty notices was not a "reasonable" period of time, (2) MSI was denied an opportunity to make an oral presentation in response to the amended penalty notice, and (3) there was no notification by telephone.

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[5] MSI claims that it did not receive the amended pre-penalty notice until March 4, 1997. Def.'s Brief at 3.

[6] Regulations provide, "[i]f a [response] period of fewer than 30 days is specified, the port director, if possible, shall inform the named person of the prepenalty notice and its contents by telephone at or about the time of issuance." 19 C.F.R. § 162.78(a).

[7] Regulations provide, "the notice shall * * * state the amount of duties payable and how it was calculated." 19 C.F.R. § 162.79b.

[8] MSI claims that it did not receive the amended penalty notice until March 19, 1997. Def.'s Brief at 3.

[9] MSI sent this notice by both facsimile and Federal Express. Def.'s Aff. Ex. 7.

[10] This is an amount equivalent to four times the total loss of revenue. 19 U.S.C. § 1592(c)(2)(a)(A)(ii).

[11] Regulations provide that if the petitioner is not satisfied with Customs' decision, "a supplemental petition may be filed * * *. Such petition shall be filed * * * [w]ithin the time prescribed in the decision * * *." 19 C.F.R. § 171.33(a)

A. Seven Day Response Period

If Customs determines that a written penalty claim should issue against an importer, then

> [s]uch person shall have a *reasonable opportunity* * * * to make representations, both oral and written, seeking remission or mitigation of the monetary penalty.

19 U.S.C. § 1592(b)(2)(1988)(emphasis added).

MSI contends that Customs failed to take into consideration time for mailing and thus did not leave MSI with a reasonable amount of time to respond to the amended pre-penalty and penalty notices. Def.'s Brief at 11.

Customs generally allows a person served with either a pre-penalty or penalty notice thirty days from the date of the mailing of the notice to respond. 19 C.F.R. §§ 162.78(a), 171.12(b). In the case of pre-penalty notices, Customs' regulations permit the agency to specify a shorter response period when "less than 1 year remains before the statute of limitations may be asserted as a defense." 19 C.F.R. § 162.78(a). For penalty notices, Customs' regulations provide that where "fewer than 180 days remain from the date of the penalty notice before the statute of limitations may be asserted as a defense," Customs may shorten the time period allowed for response to a penalty notice. 19 C.F.R. § 171.12(e). In no event, however, may a party be given less than seven days in which to respond to either a pre-penalty or penalty notice. 19 C.F.R. §§ 162.78(a), 171.12(e).

Both sides agree that Customs was entitled to limit MSI to a shortened response period.[12] Furthermore, the seven day response time has been approved by this Court in other cases. *See United States v. Ziegler Bolt and Parts Co*, 19 CIT 13, 21 (1995) (holding "defendant was afforded substantive and procedural due process at the administrative level" when he was given seven days to respond to a pre-penalty notice for negligence).

Although MSI was given seven days, it was left, after mailing time, with four days to respond to both amended notices. Pl.'s Brief at 3. In these four days, MSI had to respond to the main claim of undervalued merchandise ("main claim") and the amendment, which plead negligence or gross negligence as an alternative to fraud and assessed $53,852.51 in additional unpaid duties. In the circumstances here, four days provided a reasonable opportunity for MSI to respond to all parts of the claim.

With regard to the main claim, MSI had already on several occasions outlined its position, both in writing and orally. MSI's basic arguments were set forth in the November 12, 1996 response, and MSI's position

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[12] Section 1621 provides, "in the case of an alleged violation of section 1592 of this title arising out of *gross negligence or negligence*, such suit or action shall not be instituted more than five years after the date the alleged violation was *committed*[.]" 19 U.S.C. § 1621 (emphasis added). Since the first entry was filed on September 4, 1992, the five year statute of limitations would run on September 4, 1997. Thus, for the amended pre-penalty notice issued on February 28, 1997, there was less than one year left, and for the amended penalty notice issued on March 14, 1997, there were fewer than 180 days left. Therefore, Customs was permitted to limit the response time to seven days.

did not change when the amended notices were issued. For example, in MSI's March 7, 1997 response to the amended pre-penalty notice, MSI writes, "we continue to deny any misconduct on [MSI's] part. In this regard, we incorporate by reference the position and arguments that we have outlined in our previous submissions to your agency." *See* Def.'s Aff. Ex. 5 at 1.

In its March 20, 1997 response to the amended penalty notice, MSI again incorporated previous submissions by reference. Although MSI prefaced the reference with, "in view of the tight time constraints imposed by Customs," *see id.* Ex. 7 at 2, MSI had been incorporating previous arguments since its January 8, 1997 response to the original penalty notice, when it had thirty days to respond. Further, MSI was given the opportunity to make an oral presentation on the main claim on February 24, 1997. In short, MSI had already made its position clear to Customs in writing and orally. Thus, four days to respond to the main claim was a reasonable amount of time.

MSI's reliance upon *United States v. Stanley Works*, 17 CIT 1378, 849 F. Supp. 46 (1993), *see* Def.'s Brief at 11, is misplaced. First, in *Stanley Works*, this Court held that the seven day response period was unwarranted because Customs failed to demonstrate that less than one year remained before the statute of limitations could have been asserted as a defense. *Stanley Works*, 17 CIT at 1379–82, 849 F. Supp. at 48–50. In the present case, however, Customs was entitled to shorten the response period to seven days because, as both sides agree, there was less than one year remaining. *See supra* p.7, note 12. Second, the Court in *Stanley Works* determined that due process was denied when Customs gave a seven day period within which the importer could request an oral hearing. *Stanley Works* at 50. The Court reasoned that, assuming a three-day mail period for both notice and response, Defendant would have had only one day in which to contact its attorney, formulate its response and mail it. *Id.* at 51. *Stanley Works* is different from the present case in that MSI had the use of facsimile. MSI could have sent its response on the very last day, and it would have arrived at the Customs office minutes later.[13] In short, the precedence set forth in *Stanley Works* is not applicable to the case at bar.[14]

With respect to the alternative plea of negligence or gross negligence, four days was a reasonable amount of time to respond. Although negligence or gross negligence was not alternatively plead in an official notice until the amended pre-penalty notice, this issue had been discussed between the parties since their first conversations.[15] Given MSI's famil-

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[13] MSI had in fact used facsimile to send its responses to both the amended pre-penalty and penalty notices. *See* Def.'s Aff. Ex. 5 and 7; *see also infra* p. 12.

[14] MSI questions why Customs did not "simply transmit the notices by facsimile, as Customs did when sending its March 21, 1997 penalty decision." Def.'s Reply Pl.'s Opp'n Mot. to Dismiss ("Def.'s Reply") at 3, note 2. This claim is irrelevant to the pending motion because the Court is not concerned with what other options Customs had to send its notices. The main concern is whether four days provided a reasonable amount of time to respond.

[15] As far back as its August 13, 1996 letter, the U.S. Customs Service stated that MSI might be guilty of negligence. "At a very minimum, [MSI] acted with knowledge of or wanton disregard for the relevant facts and with indifference to or disregard of its importing obligations." Pl.'s Brief Ex. B at 2 (citing Letter from Dept' Treasury re: Maxi Switch Inc.(Aug. 13, 1996)).

iarity with this issue, and that MSI did not contest this issue in its brief, the Court finds that four days was a reasonable amount of time for MSI to respond to the alternative plea.

With regard to the $53,852.51 in additional unpaid duties, MSI maintains that failure to allow time for mailing "looms far more significant because only in the amended notices did Customs first provide MSI with any information regarding the amount of lost duties concerning allegedly unreported assists." Def.'s Brief at 11. However, for the purposes of this motion, the $53,852.51 represents additional lost duties which pertained to the unreported dutiable assists alleged by Customs in its original pre-penalty and penalty notices.[16] *See supra* p. 4, note 4.

Since the original pre-penalty and penalty notices both stated that MSI had failed to report dutiable assists involving the 136 entries, MSI had been on notice of this violation for more than six months. Thus, the Court finds MSI had sufficient opportunity to respond to Customs' allegations.

Finally, MSI's early response to the amended penalty notice supports the Court's conclusions here. The response to the amended penalty notice was due on March 21, 1997. MSI sent its response by facsimile and Federal Express on March 20, 1997. If MSI needed more time to formulate its response, it could have worked on it for another day and faxed it to Customs on the due date. That MSI faxed the response to Customs the day before it was due permits the inference that seven days was indeed enough time to respond.

B. Opportunity for Oral Presentation

MSI maintains that it was entitled to an opportunity to make an oral presentation in conjunction with its written response to Customs' amended penalty notice issued March 14, 1997. MSI further states that being deprived of this opportunity is "all the more troubling given that this oral presentation would have been the first time in which MSI would have had an opportunity * * * to address Customs' allegations regarding allegedly unreported assists." *See* Def.'s Brief at 12.

Section 1592(b)(2) states that "[s]uch person shall have a reasonable opportunity * * * to make representations, both *oral and written*, seeking remission or mitigation * * *." (emphasis added). In addition, 19 C.F.R. § 171.14(a)(2) provides, "[t]he person shall be given a reasonable opportunity to make an *oral presentation* provided that a [written] petition has been filed * * * and that the petition contains a request to pres-

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[16] Accordingly, some of MSI's arguments on this issue are inapplicable. For example, MSI argues, "only in Customs' amended penalty notice did Customs for the first time provide MSI with the information concerning the alleged loss of revenue and how such alleged loss was computed." Def.'s Reply at 2.

However, as Customs construes the facts, MSI's statement is untrue. While the amended penalty notice was the first time Customs explained how it calculated the $53,852.51, this calculation only applies to the additional duties, which resulted from the unreported assists alleged in Customs' original notices.

The manner of calculation for the assists in the original notices, it seems, was provided in the penalty notice. The spread sheet accompanying the penalty notice states the total loss of revenue ($679,343) and how it was computed (the spread sheet provides the lost revenue from each of the 136 entries, and for each entry, the duty paid versus the actual duty due). Def.'s Aff. Ex. 2 at 5–9. Thus, Customs' original notices contained an adequate explanation on how Customs calculated the amount of duties payable.

Thus, for the purposes of this motion, the Court cannot credit MSI's contention that until the amended penalty notice Customs did not supply the amount of lost revenue and how it was computed.

ent orally the reasons for remission or mitigation * * *." (emphasis added). MSI followed these procedures and was thus entitled to an oral presentation.

This oral presentation, if it were granted, however, would not have been the "first time" for MSI to address the allegations of unreported assists. As Customs renders the facts, MSI was given two opportunities to make oral presentations (once after issuance of the draft pre-penalty notice and once after the issuance of the penalty notice). Thus, MSI had previous opportunities to address the issue of undeclared assists.

Still, the additional oral presentation, if granted, would have been the only opportunity to orally address the assessment of $53,852.51 in additional unpaid duties. However, this alone does not warrant the granting of a motion to dismiss. "[F]ailure to provide adequate notice or opportunity to participate at the administrative level is generally not perceived as a jurisdictional prerequisite to an enforcement action brought by the agency." *United States v. Jac Natori Co., Ltd.*, 17 CIT 348, 350, 821 F. Supp. 1514, 1516–17 (1993) (citing *United States v. Priority Products, Inc.*, 4 Fed. Cir.(T) 88, 92, 793 F.2d 296, 300 (1986)); *see also Nickey v. Mississippi*, 292 U.S. 393, 396 (1934) (holding that an opportunity for trial de novo affords defendants all due process to which they are entitled: no constitutional mandate that defendant have notice and opportunity to respond at administrative level if "all available defenses may be presented to a competent tribunal before exaction of the [obligation]").

C. No Telephonic Notification

MSI maintains that Customs could have mitigated the effects of delayed delivery by informing MSI by telephone of the issuance of the pre-penalty notice. Def.'s Brief at 11. Customs' regulations state, "[i]f a period of fewer than 30 days is specified, the port director, if possible, shall inform the named person of the pre-penalty notice and its contents by telephone at or about the time of issuance." 19 C.F.R. § 162.78(a).

The regulation is, nonetheless, qualified by the words, "if possible." Telephonic notification is not mandatory; it is just another means of providing a reasonable opportunity to respond.

The complaint states that MSI had four days to respond to both notices. Assuming this, Customs failure to provide telephonic notification is not fatal. MSI had a reasonable opportunity to respond and was thus afforded due process.

II. Failure to Exhaust Administrative Remedies

Finally, MSI contends that Customs failed to exhaust its administrative remedies[17] when it prematurely referred this case to the Depart-

[17] The applicable law reads, "[i]n any civil action not specified in this section, the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. 2637(d) (1988).

ment of Justice ("Justice") and thereby divested itself of any power to consider MSI's supplemental petition.[18] *See* Def.'s Brief at 8, note 5.

Customs' premature referral to Justice was rendered harmless, however, because of MSI's untimely filing of its supplemental petition. Customs stated that MSI would have fifteen days from March 21, 1997 to respond to the mitigation decision. MSI did not file its supplemental petition until April 11, 1997, six days late. Thus, even if Customs had waited the full fifteen days, until April 5, to refer its case to Justice, it still would not have been able to consider MSI's supplemental petition.

The substantive issue, nonetheless, is whether the defendant was afforded a sufficient opportunity to be heard. *See United States v. Rotek, Inc.*, 22 CIT ____, slip op. 98–75 (June 9, 1998) (finding Customs' early referral of penalty action to Justice did not deprive importer of due process and refusing to dismiss Customs' penalty claim).

MSI's supplemental petition addressed no new allegations; MSI only raised again issues on which it previously had an opportunity to be heard. For example, in its petition MSI asserts that Customs should have found it guilty of negligence, not gross negligence. MSI had stated this claim before.[19] Further, MSI disagreed with Customs' determination that a prior good record would not be considered as a mitigating factor. MSI had already made its position on this issue clear also.[20]

"[I]t is * * * well settled that courts will not set aside agency action for procedural errors unless the errors 'were prejudicial to the party seeking to have the action declared invalid.'" *See Sea-Land Serv., Inc. v. United States*, 14 CIT 253, 257, 735 F.Supp. 1059, 1063, *aff'd* and *adopted*, 9 Fed. Cir. (T) 59, 923 F.2d 838 (1991).[21]

CONCLUSION

Upon review and careful consideration of the instant motion, the aforementioned statutory provisions, relevant case law, and all other papers and proceedings had herein, it is hereby,

ORDERED that MSI's motion to dismiss is denied.

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[18] When Customs referred the matter to the Department of Justice prematurely, Customs could no longer consider the supplemental petition. *See* 19 C.F.R. § 171.24 ("No action shall be taken on any petition if the civil liability has been referred to the Department of Justice * * *.").

[19] In its response to the pre-penalty notice, MSI states, "[t]his type of conduct has not [sic] been regarded by the U.S. Court of International Trade * * * as indicative of negligence, not fraud. *See United States v. Menard, Inc.*, 17 C.I.T. 1229, 1229 (1993) ('carelessness or negligent improvisation' in valuation of merchandise constitutes 'midrange of ordinary negligence')." Def.'s Aff. Ex. 3 at 5 (citing Letter from Piper & Marbury in response to pre-penalty notice (Nov. 13, 1996)).

[20] In its response letter to the pre-penalty notice, MSI states, "MSI might also lay claim to a 'prior good record,' since, to the best of our knowledge, its only prior infraction was a minor penalty relating to a country of origin marking issue that resulted in no revenue loss." Def.'s Aff. Ex. 3 at 6.

[21] The parties disagree about a precedential point set forth in *United States v. Obron Atl. Corp.*, 18 CIT 771, 862 F. Supp. 378 (1994). Customs uses *Obron* to argue that there is no requirement that Customs provide *rulings* on supplemental petitions. Pl.'s Brief at 8. MSI refutes this, stating that its complaint was not that Customs had failed to rule on, but failed to even *consider* MSI's petition. Def.'s Reply at 4. This debate is one piece of the bigger question of whether MSI was given a sufficient opportunity to be heard. This Court holds that MSI was given such an opportunity and thus does not address this particular debate.

(Slip Op. 98–112)

RAUTARUUKKI OY, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND BETHLEHEM STEEL CORP., U.S. STEEL GROUP (A DIVISION OF USX CORP.), DEFENDANT-INTERVENORS

Consolidated Court No. 97–05–00864

[Remand to Commerce to reconsider categorization of grade "A" plate and total facts available margin for wide flats and beveled plate. Commerce's decision not to distinguish wide flats from normal cut-to-length plate and Commerce's use of partial facts available for normal cut-to-length plate sustained.]

(Dated August 4, 1998)

Holland & Knight LLP, (Frederick P. Waite and *Kimberly R. Young)* for plaintiff and defendant-intervenor Rautaruukki Oy.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, *A. David Lafer*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Michele Lynch), Myles S. Getlan*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Dewey Ballantine LLP, (Kristen M. Neller, Frank J. Schweitzer, Michael H. Stein, and *Bradford L. Ward)* for plaintiff and defendant-intervenor Bethlehem Steel.

OPINION

RESTANI, *Judge:* This matter is before the court on cross motions for judgement upon the agency record, pursuant to USCIT Rule 56.2, brought by Rautaruukki Oy ("Rautaruukki" or "Importer") and by Bethlehem Steel Corporation and U.S. Steel Corporation, a unit of USX Corporation (collectively "Domestic Producers"). The International Trade Administration, U.S. Department of Commerce's ("Commerce") determination under review is *Certain Cut-to-Length Carbon Steel from Finland*, 62 Fed. Reg. 18,468 (Dep't Commerce 1997) (final results of second antidumping duty administrative review) [hereinafter *"Final Results II"],* pursuant to 19 U.S.C. § 1516a(a)(2)(B) (1994). The court addresses issues raised by Rautaruukki and the Domestic Producers in their respective motions separately, in that order.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). Commerce's final determination must be upheld unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1994).

I. *Grade "A" Steel Plate Specifications for Matching Purposes*

FACTS

In Rautaruukki's first administrative review, Commerce treated all steel plate certified as grade "A" by any national classification society as identical merchandise. *See Certain Cut-To-Length Carbon Steel Plate from Finland*, 61 Fed. Reg. 2,792, 2,797 (Dep't Commerce 1996) (final

results of first antidumping administrative review) [hereinafter *"Final Results I"*]. Commerce concluded that Rautaruukki had not sold subject merchandise at less than fair value ("LTFV") during the review period and gave Rautaruukki a zero dumping margin. *Id.* at 2,797.

During the second administrative review, Commerce issued a questionnaire to Rautaruukki which described the eight product characteristics comprising the model match criteria Commerce would use to compare merchandise when calculating the dumping margin. *Questionnaire* (Sep. 14, 1995), at V–14–V–16, P.R. Doc. 346, Def.'s App., Tab 1, at 2–4. Commerce stated that when the third characteristic asks for plate "specification and/or grade," *id.* at V–14, Def.'s App., Tab 1, at 2, "specification" refers to "broad-based characteristics of a particular type of plate," which includes the "method of manufacture, testing requirements, heat treatment, chemical requirements, etc." and "grade" is a subcategory of specification, which "indicates the specific mechanical and chemical characteristics of a product conforming to a specification," *Questionnaire*, at V–17, Def.'s App., Tab 1, at 5.

The explanatory notes to the model match list described the information Commerce required Rautaruukki to provide with regard to "specification and/or grade." Commerce requested "all of the relevant mechanical and chemical characteristics which define all specifications and grades sold." *Questionnaire*, at V–18, Def.'s App., Tab 1, at 6. Commerce provided a template from which Rautaruukki was to create a specification chart. *Questionnaire*, at V–19, Def.'s App., Tab 1, at 7. Commerce explained that, "[s]ince there are different specifications for identical steel plate sold around the world, we need some basis of comparison between U.S. standards and those of other countries." *Id.* All the information and explanations Commerce provided and the requests it made were identical to those of the first administrative review. *Compare Questionnaire*, at V–18, Def.'s App., Tab 1, at 6, *with Questionnaire*, at 8, Pl. Rautaruukki.'s Reply App., Tab B, at 4.

The chart Rautaruukki provided Commerce in response reported information identical to that submitted in response to Commerce's identical request during the first administrative review. *Compare Rautaruukki's Response* (Nov. 13, 1995), Ex. B–5, P.R. Doc. 364, Def.'s App., Tab 2, at 3, *with Rautaruukki's Response* (Feb. 15, 1995), Pl. Rautaruukki's Reply App., Tab A, at 1. The chart described the chemistry and strength requirements for the specification of plate sold in the United States (hereinafter "AB A"), as well as the requirements for those specifications of plate sold in the home market. *Rautaruukki's Response*, Ex. B–5, Def.'s App., Tab 2, at 3. Rautaruukki identified the specifications of plate sold in the home market as "equivalent specifications" to the U.S. AB A specification, including with the AB A specification BV A, GL A, LR A, NV A, and PC A[1] specifications. *Id.* The chart

[1] The AB A specification/grade is established by the American Bureau of Shipping; GL A by Germanischer Lloyd; LR A by Lloyd's Register of Shipping; NV A by Det Norske Veritas; BV A by Bureau Veritas; and PC A by Russian Register of Shipping. *Id.*

described chemical and strength requirements of the combined group of home market "equivalent specifications," which varied at certain points from those for the AB A specification. *Id.*

Commerce then requested that Rautaruukki "provide requested specification and grade information for each model separately as specified in the questionnaire," *Supplemental Questionnaire* (Jan. 29, 1996), at 4, P.R. Doc. 396, Def.'s App., Tab 3, at 2, and "explain how identical models AB A in the U.S. market and AB A in the home market have different carbon levels." *Id.*

In response, Rautaruukki offered a chart which reflects "the target or 'aim' chemistry for each grade with identical and similar specifications," *Rautaruukki's Supplemental Questionnaire Response* (Feb. 20, 1996), at SUPP–14, C.R. Doc. 411, Def.'s App., Tab 4, at 5, entitled "List of Identical and Most Similar Specifications and Grades," *Rautaruukki's Supplemental Questionnaire Response*, at SUPP–18, Def.'s App., Tab 4, at 6, and a compilation of mill certificates, *id.*, at SUPP–18, Tab 4, at 7–13. The mill certificates show some small differences in the chemical characteristics for AB A, *Rautaruukki's Supplemental Questionnaire Response*, Def.'s App., Tab 4, at 9 (*e.g.*, carbon levels 0.11 to 0.18 percent), LR A, *Rautaruukki's Supplemental Questionnaire Response*, Def.'s App., Tab 4, at 11 (*e.g.*, carbon levels 0.13 to 0.15 percent), and GL A, *Rautaruukki's Supplemental Questionnaire Response*, Def.'s App., Tab 4, at 13 (*e.g.*, carbon levels 0.13 to 0.18 percent).

Commerce diverged from its position on plate specifications in the first review, in which it had assigned one value to all plate specifications. *See Final Results I*, 61 Fed. Reg. at 2797. In the second review Commerce assigned one value to U.S. AB A and a different value to grade "A" plate classified by all other national societies. *Final Results II*, 62 Fed. Reg. at 18470–71.

Rautaruukki first learned of Commerce's decision upon publication of the Preliminary Results. *Certain Cut-to-Length Carbon Steel Plate from Finland*, 61 Fed. Reg. 51901, 51902 (Dep't Commerce 1996). In its response, Rautaruukki maintained that Commerce erred in treating subject merchandise produced to different specifications as non-identical merchandise, given that Rautaruukki had submitted what it had deemed to be evidence of the identicalness of "A" grade plate, as defined by each of the various national classification societies. *Rautaruukki's Response to Preliminary Results* (Nov. 18, 1996), at 3–6, P.R. Doc. 494, Def.'s App., Tab 10, 2–5.

Commerce explained in *Final Results II*, 62 Fed. Reg. at 18,470–71, that it decided to treat plate classified "A" by different societies differently, notwithstanding its recognition that Rautaruukki used identical plate to meet orders governed by different classification societies. *Id.* Commerce noted the change from its practice in the first review, explaining that it had not become aware of the need for the change until the second review. *Id.* Commerce stated that it decided to make the change based upon Rautaruukki's failure to prove the specifications of

the different classification societies to be identical. *Id.* The second administrative review resulted in a dumping margin of 24.95 percent for Rautaruukki. *Id.* at 18,475.

DISCUSSION

Rautaruukki challenges Commerce's decision to treat U.S. grade "AB A" steel plate and all other grade "A" plate as identical merchandise, *Final Results II*, 62 Fed. Reg. at 18,469, contending that this decision was unsupported by substantial evidence and that this change[2] was procedurally unfair, as Rautaruukki had insufficient notice and lacked adequate opportunity to submit a factual response. The court agrees.

In successive reviews, Commerce is not absolutely bound by its prior decisions. Commerce may change its position, provided that "it explains the basis for its change and providing that the explanation is in accordance with law and supported by substantial evidence." *Cultivos Miramonte S.A. v. United States*, 980 F. Supp. 1268, 1274 (Ct. Int'l Trade 1997) (footnotes omitted). Thus, Commerce is not compelled to adhere to prior decisions if new arguments or facts emerge that support a different conclusion. *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988). Commerce learns through experience and is allowed to refine and adjust its stance. It is still, however, required to explain its actions. *Cultivos*, 980 F. Supp. at 1274.

Commerce asked Rautaruukki to report its U.S. and home market sales in accordance with Commerce's eight model match product characteristics. *Questionnaire*, at 1, Def.'s App., Tab 1, at 1. Based on the results of the first review, Rautaruukki treated all plate with shipbuilding grade "A" as identical merchandise. *See, e.g., Rautaruukki's Response*, at B–5, Def.'s App., Tab 2, at 3. Commerce found Rautaruukki's reporting unsatisfactory and ambiguous and requested additional information and clarification. *Supplemental Questionnaire*, at 4, Def.'s App., Tab 3, at 2. Commerce, however, did not make it clear that the identicalness of all grade "A" plate was at issue.

Apparently minor chemical composition variations shown in the mill certificates Rautaruukki submitted, *see Rautaruukki's Supplemental Questionnaire Response*, Def.'s App., Tab 4, at 9, 11, 13, are the only record evidence upon which Commerce might find that the specifications for the various grades differed. Commerce did not request, and respondent did not furnish independently, any nonsubjective evidence from which Commerce could determine the significance of those differences. Rautaruukki provided only its own assurance that the difference was not commercially significant. While this is evidence, Commerce is not required to accept it. But neither must the court regard as substantial evidence seemingly nominal differences in chemical composition, the significance of which Commerce has not explained.

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[2] Defendant objects to Rautaruukki's characterization of Commerce's decision as a change in methodology. This nomenclature is irrelevant to whether Commerce had evidentiary support for its decision and whether the change was made in a procedurally fair manner.

At oral argument, defendant stated that Commerce had based its decision to consider plate classified "A" by different classification societies as non-identical, not upon the mill certificates, but upon Rautaruukki's failure to provide evidence of identicalness. Apparently Commerce had expected Rautaruukki to respond to its questionnaires by submitting complete specifications of each classification society. The court finds that Commerce did not specifically request this information, and that Rautaruukki reasonably attempted to comply with Commerce's requests, as it understood them. Rautaruukki likely concluded, based on the past history of the antidumping order, that Commerce's concerns in its two questionnaires and other correspondence related only to coding and did not require a further showing by Rautaruukki of the identicalness of the classification societies' specifications. *See Questionnaire*, at V–14, Def.'s App., Tab 1, at 2; *see also Supplementary Questionnaire*, at 4, Def.'s App., Tab 3, at 2; *and see Commerce's Sales Verification Report* (Sep 5, 1996), at 4, C.R. Doc. 452, Def.'s App., Tab 7, at 3.

Apparently, Commerce made its decision based on Rautaruukki's failure to meet an evidentiary burden the existence of which Commerce had not made clear. To that extent, the manner in which Commerce made its decision to treat U.S. AB A plate as not identical to plate meeting other classification societies' "A" specification was lacking in procedural fairness. While Commerce may correct what it discovers to be a prior flaw, *see Cultivos*, 980 F. Supp. at 1273–74, that right is balanced against respondent's right to procedural fairness, *see Citrusuco*, 12 CIT at 1209, 704 F. Supp. at 1088 (agency must explain departures from prior decisions to insure consistent application of statute); *see also Budd Co. v. United States*, 14 CIT 595, 602, 746 F. Supp. 1093, 1099 (1990) (fairness central to antidumping law enforcement by Commerce).

Because Commerce has indicated it lacked sufficient information to make a factually supportable determination on this issue, remand is ordered to provide respondent an opportunity to submit the necessary information. If Commerce relies on nominal differences in chemical composition, it must explain why they are significant.

II. *Wide Flats and Normal Cut-to-Length Comparison*

FACTS

Commerce compared normal cut-to-length carbon steel plate sold to the U.S. market with wide flats sold in the home market, having concluded that the distinction was not and should not have been one of the model match criteria. *Final Results II*, 62 Fed. Reg. at 18471. Rautaruukki maintained in its communication with Commerce that cut-to-length carbon steel plates and wide flats are distinct, supplying a products list, *Rautaruukki's Products List*, C.R. Doc. 454, Pl. Rautaruukki's App., Tab 15, at 1, and a "report [that] lists the two first characters of product control numbers and shows how they are created," *See Report* (Nov. 7, 1995), Pl. Rautaruukki's App., Tab 16, at 1. Rautaruukki wrote to Commerce to argue the importance of the demonstrated differences, *Letter from Rautaruukki to Commerce* (Aug. 2, 1996), at 3, C.R.

Doc. 443, Pl. Rautaruukki's App., Tab 17, at 3, and submitted documentation indicating that the raw material for wide flats is basic cut-to-length plate, *Hot-Rolled-Steel Products—Production Programme* (Jan. 1995), P.R. Doc. 356, Pl. Rautaruukki's App., Tab 2; *Rautaruukki Steel Guide Hot-rolled Plate and Sheet*, P.R. Doc. 356, Pl. Rautaruukki's App., Tab 19, at 1. Rautaruukki attempted to show that, although wide flats may have some of the same physical characteristics as basic cut-to-length, they are manufactured by different processes and have different uses.

Commerce did not change its model match program but did address Rautaruukki's arguments, reiterating that "[w]hether or not subject merchandise is beveled or wide flat is not a model match criterion." *Final Results II*, 62 Fed. Reg. at 18471. Commerce added that Rautaruukki had *sua sponte* deviated from Commerce's model match program in its response, without suggesting to Commerce that it change the program, giving proper explanations, or submitting information on the record to demonstrate the relevance of beveling or wide flats as a model match criterion. *Final Results II*, 62 Fed. Reg. at 18471.

DISCUSSION

Rautaruukki submits that Commerce erred in comparing basic cut-to-length carbon steel plate with wide-flats by failing to distinguish them in its model match program. The court finds Commerce's determination that differences between wide flats and normal cut-to-length plate do not necessitate a distinct model match criterion to be supported by substantial evidence in the record.

Commerce has the discretion "to choose the manner in which 'such or similar' merchandise shall be selected," *Koyo Seiko Co., Ltd. v. United States*, 66 F.3d 1204, 1209 (Fed. Cir. 1995), provided its actions are reasoned and supported by substantial evidence on the record, *see Rhone-Poulenc, Inc. v. United States*, 927 F. Supp. 451, 454 (Ct. Int'l Trade 1996). Respondent bears the burden of demonstrating the necessity for a change in Commerce's model match program. *Koyo Seiko Co., Ltd. v. United States*, 19 CIT 1272, 1277, 905 F. Supp. 1112, 1117 (Ct. Int'l Trade 1995) (citing *Timken Co. v. United States*, 11 CIT 786, 804, 673 F. Supp. 495, 513 (1987)). Respondent must also make timely explanations to ensure that Commerce understands and correctly uses the data it submits. *Zenith Elecs. Corp. v. United States*, 18 CIT 870, 880 (1994).

Commerce did not find the evidence Rautaruukki provided that wide flats are physically distinct from cut-to-length plate sufficient to alter its program. Having failed to persuade Commerce of the relevance of its evidence, Rautaruukki could not then unilaterally change the model match methodology, as it appears to have tried to do through its data coding. It was incumbent upon Rautaruukki instead to demonstrate that a change in Commerce's model match was required. *See Koyo Seiko*, 905 F. Supp. at 1117. Rautaruukki did not clearly indicate to Commerce the need to amend the model match program. Instead, Rautaruukki failed to comply with Commerce's model match methodology and explained its

own reasons for deviating from Commerce's model. *Letter from Rautaruukki to Commerce*, at 3, Pl. Rautaruukki's App., Tab 17, at 3.

Rautaruukki showed that the products were different, but did not explain the *relevance* of those differences to demonstrate why Commerce needed to alter its model to avoid comparing them. Rautaruukki simply assigned different code numbers to wide flats and only later explained this coding deviation in a letter to Commerce in response to Domestic Producers' comments on alleged deficiencies in Rautaruukki's questionnaire response. *Letter from Rautaruukki to Commerce*, at 3, Pl. Rautaruukki's App., Tab 17, at 3. Respondent argued that wide flats "require separate processing and handling on a different product line than basic cut-to-length plate. The raw material to wide flats and beveled plates is cut-to-length plate." *Id.* This explained why Rautaruukki considered wide flats different from normal cut-to-length plate but did not show how the differences would distort the model match or required Commerce to change it. The court therefore finds that Rautaruukki did not satisfy its burden and sustains Commerce's comparison of wide flats and normal cut-to-length plate.

III. *Selection of Partial Facts Available for Normal Cut-to-Length Plate*

FACTS

In response to Commerce's questionnaire relating to the calculation of cost of production, *Questionnaire*, at 1, Def.'s App., Tab 1, at 1, Rautaruukki indicated that it uses an "actual" cost accounting system, which generates information used to calculate weighted-average production costs, from which base costs are derived. *Cost Verification Report* (Sep. 11, 1996), at 12–13, C.R. Doc. 454, Def.'s App., Tab 8, at 6–7. Extras costs, accounting for differences in quality and dimensions in various plate products, are then added to base cost to derive the total cost of the product for the specified reported sale. *Id.*

Domestic Producers commented to Commerce that Rautaruukki's method of calculating manufacturing costs was "wholly inadequate." *Domestic Producers' Comments on Rautaruukki's Questionnaire Response* (Jan. 11, 1996), at 22, P.R. Doc. 393, Def.'s App., Tab 11, at 4. Commerce requested that, at verification, complete supporting documentation be available for some merchandise so the verifiers might create an accurate and thorough trail of the process of cost allocation. *Letter from Commerce to Rautaruukki* (May 20, 1996), at 1, C.R. Doc. 17, Pl. Domestic Producers' App., Tab 3, at 1. At verification, Rautaruukki provided Commerce access to its on-line computer system and a cost extras book, neither of which was specifically for the period of review ("POR"). *See Final Results II*, 62 Fed. Reg. at 18,472–73. Rautaruukki indicated that it does not maintain a log or any documentation indicating cost changes for extras from one period to another. *Commerce Cost Verification Report*, at 4, Def.'s App., Tab 8, at 4.

After verification, Commerce indicated that it had "reviewed the base-cost build-up of this material and the weighted average cost for all production of this material during the POR. [It] also reviewed the repor-

ted 'extras costs' associated with this specific product." *Commerce's Cost Verification Report*, at 4, Def.'s App., Tab 8, at 4. Domestic Producers responded to Commerce's verification report, asserting that "Rautaruukki was unable to provide the necessary data to support the calculation of product-specific costs." *Domestic Producers' Comments on Verification Reports* (Sep. 17, 1996), at 3, C.R. Doc. 448, Def.'s App., Tab 9, at 2. Domestic Producers claimed Rautaruukki did not maintain documentation sufficient to verify the accuracy of the cost-extras adequately, additionally noting allegedly "[c]onsistent and pervasive deficiencies" that precluded verification. *Id.* Domestic Producers thus urged Commerce to resort to total facts available for all plate products. *Id.* at 13, Def.'s App., Tab 9, at 5.

Commerce found resort to total facts available unnecessary with respect to normal cut-to-length steel plate products, because "the Department was able to tie Rautaruukki's base costs to appropriate financial and accounting documentation" and had found these base costs represented "the largest portion of Rautaruukki's total cost." *Final Results II*, 62 Fed. Reg. at 18472–73. Commerce acknowledged that the documentation Rautaruukki did provide for cost extras was not for the period of review. *Id.* at 18473. Commerce further noted that, at verification, of the 48 different reported cost extras it compared to the costs listed in the cost extra book, 16 had shown slight inconsistencies of one or two Finnish Marka ("FIM"). *Id.* at 18473. As a result of these small discrepancies, which Commerce considered negligible, and because Commerce was unable to verify cost extras for the exact period in question, it used partial facts available for the normal cut-to-length cost extras. *Id.* Commerce used as partial facts available the highest reported cost extras for products that were not beveled or wide flat and the highest reported cost extras for painted and non-painted plate. *Id.*

Discussion

Domestic Producers challenge Commerce's resort to partial rather than total facts available to calculate Rautaruukki's dumping margin in the second review. Commerce may resort to "facts otherwise available in reaching the applicable determination," 19 U.S.C. § 1677e(a) (1994), if an antidumping respondent provides information which cannot be verified, 19 U.S.C. § 1677e(a)(2)(D). There is no clear statutory guidance on when Commerce should fill in with partial facts available information and when it should use a substitute margin. Thus, the court looks for reasoned decision making supported by evidence.

At verification, Commerce determined Rautaruukki's base costs, all of which were verifiable, to comprise the largest portion of its total costs. *Final Results II*, 62 Fed. Reg. at 18472–73. After verification, with respect to cost extras, Commerce treated wide flats and beveled plate products differently from cut-to-length plate. *Id.* at 18473. Commerce agreed with Domestic Producers that total facts available should be applied to cost extras for wide flats and beveled plate products, for which no cost extras could be verified. *Id.* at 18472–73. By contrast, finding

only slight discrepancies and having what it considered unalarming problems linking the cost extra data with the period of inquiry, Commerce applied partial facts available for cost extras for normal cut-to-length plate. *Id.* at 18473. Commerce recognized that its linking problem at verification resulted not from any substantial variation in the magnitude of the cost extras but rather from the particularities of Rautaruukki's record keeping. *Id.*

The cost verification report is a detailed account of Commerce's inquiry into the cost extra data for cut-to-length plate. *See Commerce's Cost Verification Report*, at 12–13, Def.'s App., Tab 8, at 6–7. Commerce correctly concluded that this case is not akin to *Certain Cut-to-Length Carbon Steel Plate From Sweden*, 61 Fed. Reg. 51,898 (Dep't Commerce 1996) (preliminary results) [hereinafter *"Sweden"]*. There Commerce was unable to verify "numerous and fundamental aspects of the respondents' responses". *Final Results II*, 62 Fed. Reg. at 18473; *see also Sweden*, 61 Fed. Reg. at 51,899. Here, Commerce's experience simply does not comport with Domestic Producers' re-characterization of the experience as wrought with difficulty. For these reasons the court finds Commerce's decision not to apply total facts available with respect to normal cut-to-length plate to be both reasonable for a generally cooperative respondent and supported by substantial evidence in the record.

IV. *Revision of Total Facts Available for Wide Flats and Beveled Plate*

FACTS

During the second administrative review, for facts available for wide flats and beveled plate products, Commerce used 32.80 percent *ad valorem*, *id.* at 18475, the weighted-average duty rate from the original LTFV investigation, *Certain Cut-to-Length Carbon Steel Plate From Finland*, 58 Fed. Reg. 44165, 44165 (Dep't Commerce 1993) (order and amendment to final determination) [hereinafter *"Final Determination"]*. The original LTFV determination was appealed. Subsequent to Commerce's decision in the second administrative review, this Court affirmed Commerce's remand determination, which resulted in a final weighted-average dumping margin of 40.36 percent *ad valorem*. *Rautaruukki Oy v. United States*, Slip Op. 97–56, No. 93–09–00560, 1997 WL 260029 (Ct. Int'l Trade May 13, 1997); *Certain Cut-to-Length Carbon Steel Plate from Finland*, 62 Fed. Reg. 55782, 55783 (Dep't Commerce 1997) (amended final determination).

DISCUSSION

Domestic Producers request, and the government consents to, a remand for Commerce to correct its dumping margin calculation to reflect a subsequent change in the duty rate it used for total facts available. Domestic Producers request that Commerce re-calculate the weighted-average dumping margin based on the final weighted-average dumping margin of 40.36 percent *ad valorem*.

Commerce may not base a facts available determination on discredited facts. *See D&L Supply Co. v. United States*, 113 F.3d 1220, 1222–23

(Fed. Cir. 1997). Accordingly, where total facts available are needed here, the court orders Commerce to apply, in lieu of the original 32.80, the revised weighted-average dumping margin of 40.46 from the LTFV investigation. *Final Results II*, 62 Fed. Reg. at 18475.

CONCLUSION

The court remands to Commerce to obtain additional grade "A" plate information from respondent and to reconsider its decision on identicalness. The court sustains Commerce's decision to compare wide flats with normal cut-to-length plate in its model match program. The court sustains Commerce's use of partial facts available with regard to normal cut-to-length plate. The court further instructs Commerce to use, for total facts available during its recalculation on remand, the revised weighted-average duty rate of 40.46 *ad valorem*.

(Slip Op. 98–113)

PRINCESS CRUISES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–06–00352

(Dated August 5, 1998)

AMENDED ORDER

MUSGRAVE, *Judge:* Upon consideration of plaintiff's Motion to Amend Judgment and For a Rehearing, defendant's response thereto, and all other papers and proceedings had herein, it is hereby

ORDERED that plaintiff's Motion to Amend Judgment is hereby granted, and, in light of defendant's lack of opposition to the Motion to Amend Judgment, plaintiff's Motion For a Rehearing is denied; and it is further

ORDERED that the Court's judgment in *Princess Cruises, Inc. v. United States*, Slip Op. 98–74 (June 9, 1998), is amended pursuant to USCIT R. 59 and this Order; and it is further

ORDERED that the arriving passenger fee provided in 19 U.S.C. § 58c is not due for passengers on cruises that: (1) begin in any place or port listed in 19 U.S.C. § 58c(b)(1)(A), (2) begin in any place or port listed in 19 U.S.C. § 58c(b)(1)(A) and end directly in the United States, or (3) begin in the United States and that arrive temporarily or end in ports of call in any place or port listed in 19 U.S.C. § 58c(b)(1)(A); and it is further

ORDERED that the Harbor Maintenance Tax provided in 26 U.S.C. § 4461 is unconstitutional as to taxes charged and based upon the embarkation of cruise passengers, in accordance with the statute which equates passengers with cargo, and in accordance with *U.S. Shoe Corp. v. United States*, ___ U.S. ___, 118 S. Ct. 1290 (1998); and it is further

ORDERED that defendant shall refund all arriving passenger fees and harbor maintenance taxes covered under this opinion, with interest.

(Slip Op. 98–114)

NORTHWEST AIRLINES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–08–00485

[Judgment for defendant.]

(Dated August 5, 1998)

Zuckert, Scoutt & Rasenberger, L.L.P., (Frank J. Costello and *Malcolm L. Benge)* for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Aimee Lee,* Commercial Litigation Branch, Civil Division, United States Department of Justice; Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service *(Joseph Spraragen),* of counsel, for defendant.

OPINION

GOLDBERG, *Judge:* Plaintiff importer, Northwest Airlines, Inc. ("Northwest"), challenges how the United States Customs Service ("Customs") classified the Brake and Steering Control Unit ("BSCU"), of the Airbus Industrie A320 aircraft that Northwest imported from France. Northwest argues that the BSCU is properly classified under the Harmonized Tariff Schedule of the United States ("HTSUS") subheading 9014.20.60 as a navigational or aeronautical instrument or appliance; 9031.90 as a measuring or checking instrument; or 8803.30.10 as a part for use in civil aircraft. Under any of Northwest's proposed classifications, the BSCU would be entitled to enter the United States duty free. Customs rejected Northwest's proposed classification, concluding instead that the BSCU should be classified under HTSUS subheading 8537.10.00 as a programmable controller and, therefore, subject to a 5.3% *ad valorem* duty.

Northwest timely filed a protest with Customs on August 8, 1990, and, when Customs denied the protest, Northwest commenced suit in the Court.

The Court exercises jurisdiction in this matter under 28 U.S.C. § 1581(a). The Court finds for defendant.

I.

BACKGROUND

The merchandise at issue is the Braking and Steering Control Unit of the Airbus Industrie A320 aircraft ("A320"). Northwest imported the BSCU as a spare part for installation in jet aircraft. Each A320 aircraft contains one BSCU. A BSCU is comprised of computer cards, electronic circuits and wires, and various metal components. *See* Pl.'s Mem. In Supp. Mtn. S.J., ("Pl.'s Mem."), at Ex. B (BSCU Maintenance Manual). The BSCU only operates in conjunction with the A320. *See* Pl.'s Mem., at Ex. A (Nietzel Decl. ¶ 22). The BSCU uses digital technology to con-

trol the braking of the four main wheels of the A320; the BSCU also steers the aircraft's nosewheel using digital technology. *See* Pl.'s Mem., at Ex. B (BSCU Maintenance Manual). More specifically, the BSCU has three functions: (i) during landing, and in aborted take-off, the BSCU assists in braking the A320; (ii) once landing is complete, it assists in steering the aircraft; and (iii) during descent, landing, take-off, and taxiing, it monitors the A320's braking and steering systems. *See* Pl.'s Mem., at Ex. A (Nietzel Decl. ¶ 7).

In April 1990, Northwest imported a BSCU from Airbus of France, the manufacturer. Subsequently, Northwest purchased four more BSCUs that are also the subject of this action. Customs classified each BSCU under HTSUS subheading 8537.10.00, dutiable at a rate of 5.3% *ad valorem*. Northwest timely protested this classification of the BSCU, asserting that it was erroneous and that the BSCU should be entered duty-free. Northwest offers three alternative classification arguments to support its claim of duty-free treatment: (i) the BSCU is navigational equipment under HTSUS subheading 901; (ii) the BSCU is measuring equipment under HTSUS subheading 9031; or (iii) the BSCU is a civil aircraft part under HTSUS subheading 8803. Under any one of the classifications proposed by Northwest, the BSCU would enter duty free pursuant to the Agreement on Trade in Civil Agreement. Customs' classification would impose a 5.3% *ad valorem* tariff.

Customs disagrees with Northwest's proposal that the BSCU enter duty free either because of the Agreement on Trade in Civil Aircraft or because no duty is provided under HTSUS subheading 9031. Customs asserts that classification of the BSCU under HTSUS subheading 8537.10.00 is correct. Customs rejects the notion that the BSCU can be classified under HTSUS subheading 9014 or 9031 because the respective HTSUS section descriptions do not apply to the BSCU. Customs further asserts that the Agreement on Trade In Civil Aircraft, as implemented through the HTSUS, does not grant the unit duty-free status.

Because the Court concludes that the BSCU is not navigational equipment, a measuring device, or a civil aircraft part subject to ATCA provisions, we find that Customs properly classified the BSCU as a programmable controller. Consequently, the Court finds in favor of Customs.

II.

STANDARD OF REVIEW

The factual portion of a Customs' classification decision enjoys a statutory presumption of correctness; the importer plaintiff has the burden of proving otherwise. 28 U.S.C. § 2639(a)(1) (1994); *Anhydrides & Chems., Inc. v. United States*, ___ Fed. Cir. (T) ___, ___, 130 F.3d 1481, 1485–86 (1997); *Goodman Mfg., L.P. v. United States*, ___ Fed. Cir. (T) ___, ___, 69 F.3d 505, 508 (1995) (statutory presumption of correctness is limited to factual determinations). Pursuant to 28 U.S.C. § 2640(a), the Court reviews Customs' classification decision *de novo*.

When it reviews classification decisions, the Court has a statutory duty to find the correct result. 28 U.S.C. § 2643(b); *Rollerblade, Inc. v. United States*, ____ Fed. Cir. (T) ____, ____, 112 F.3d 481, 484 (1997). In making this determination, the Court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878 (1984). Because the parties do not dispute Customs' factual findings here, the presumption of correctness is not relevant. This case is reviewed *de novo*.

III.

DISCUSSION

A.

This case requires the Court to determine the correct HTSUS provision for classification of the BSCU. The Court finds that Customs correctly classified the merchandise under HTSUS subheading 8537.10.00.

Under the General Rules for Interpretation of the HTSUS, the classification of a given entry "shall be determined according to the terms of the headings and any relative section or chapter notes." General Rules for the Interpretation of the Harmonized System, R. 1. In addition, the Court may refer to Explanatory Notes for assistance in interpreting the HTSUS; the Explanatory Notes "are intended to clarify the scope of the HTSUS and to offer guidance in interpreting subheadings." *Mita Copystar America v. United States*, ____ Fed. Cir.(T) ____, ____, 21 F.3d 1079, 1082 (1994)(citing *Lynteq v. United States*, 10 Fed. Cir. 112, 118, 976 F.2d 693, 699 (1992)). We now review Customs' classification decision with respect to the BSCU in light of the above guidelines.

The Court concludes that Customs correctly classified the BSCU under HTSUS subheading 8537.10.00 in accordance with the terms of the heading and the subheading, as well as the applicable Explanatory Notes. To begin, the HTSUS Chapter 85 heading reads in relevant part as follows: "[e]lectrical machinery and equipment and parts thereof; * * *." Moving on, HTSUS subheading 8537 specifically includes "[b]oards, panels, * * * consoles, desks, cabinets, and other bases equipped with two or more apparatus of heading No. 85.35 or 85.36, for electric control or the distribution of electricity * * *." More specifically, Explanatory Note 3 for subheading 8537 indicates that this subheading 8537 covers "programmable controllers." Programmable controllers are digital apparatus that use a programmable memory to store instructions for implementing specific functions such as "logic, sequencing, timing, counting and arithmetic, to control, through digital or analog input/output modules, various types of machines." HTSUS, Section VI 85.37, Explanatory Note, (3) (1990).

Here, the BSCU is clearly electrical machinery and, thus, falls within the parameters of HTSUS Chapter 85. Importantly, the BSCU also is a "programmable controller" within the meaning of HTSUS subheading 8537. The BSCU electronically signals the servovalves for each wheel,

and pilot commands are transmitted electronically from the cockpit to the BSCU. *See* Pl.'s Mem., at Ex. A (Nietzel Decl. ¶¶ 7, 13). Electronic sensors attached to the brakes and nosewheel steering system collect data and send it back to the BSCU. From this, the BSCU compares the data it receives from the sensors and other A320 computers against performance parameters programmed into its memory by the manufacturer. *See* Pl.'s Mem., at Ex. A (Nietzel ¶¶ 11, 14). The BSCU then responds by issuing instructions to hydraulic units that manipulate the aircraft's brakes or turn the nosewheel. *See* Pl.'s Mem., at Ex. A (Nietzel ¶ 12). The BSCU is preprogrammed by the manufacturer to compare and respond to data, and to control the brakes and nosewheel steering accordingly. Because the BSCU stores, processes, and implements instructions, the Court finds that the BSCU is a programmable controller as described by the terms and applicable Notes to HTSUS subheading 8537.

Thus, the Court concludes that the merchandise is correctly classified under 8537.10.00. The Court now reviews the plaintiff's alternative classification arguments to assess whether any of them better describes the BSCU.

B.

Plaintiff first claims that the BSCU should be classified under HTSUS 9014.20.60 as a navigational or aeronautical instrument or appliance. To determine the common meaning of a tariff term, the Court may rely on dictionaries and scientific authorities. *See, e.g., Lynteq*, 10 Fed. Cir. (T) at 116, 976 F.2d at 697. In addition, the Court may refer to relevant industry usage of a term for interpretive assistance. *See, e.g., E. Dillingham, Inc. v. United States*, 61 CCPA 34, 36, 490 F.2d 967, 969 (1974). After reviewing these classification aids and comparing them to the relevant terms of chapter 90, the Court finds Northwest's argument unpersuasive.

The terms of HTSUS heading 9014.20.60 are not applicable to the BSCU. HTSUS subheading 9014.20.60 encompasses electrical "instruments or appliances for aeronautical or space navigation." Neither "navigational" nor "aeronautical" accurately describes the BSCU. First, the Federal Aviation Administration defines "navigational aid" as, "any visual or electronic device airborne or on the surface which provides point-to-point guidance information or position data to aircraft *in flight*." Def.'s Cross Mtn. In Supp. S.J. ("Def.'s Mem."), at Ex. 3 (Rachiele Decl. ¶ 5, quoting FAA Aeronautical Informational Manual, N–1) (emphasis added). The BSCU does not navigate as explained by the above terms but, instead, merely steers the aircraft after it has landed. Pl.'s Mem., at Ex. A (Nietzel Decl. ¶ 7). The only guidance information the BSCU provides occurs while the plane is on the ground and, hence, it cannot be considered navigational for purposes of HTSUS subheading 9014.

Second, the term "aeronautical" is defined as relating to aeronautics, which in turn is defined as the "art or practice of sailing through the air."

Webster's Third New Int'l Dictionary 34 (1993). Again, the BSCU controls the aircraft steering once the aircraft is on the ground; therefore, the BSCU is not an instrument for aeronautical navigation.

It is also well established that the Court may use the manufacturer's view of the merchandise to determine a tariff classification. *Schott Optical, Inc. v. United States*, 7 Fed. Cir. (T) 30, 33, 862 F.2d 866, 868 (1988). And, the Court may consider marketing literature as well as operations and service manuals to ascertain the manufacturer's view. *See Schott*, 7 Fed. Cir. (T) at 33, 862 F.2d at 868; *NEC America, Inc. v. United States*, 8 CIT 184, 190, 596 F. Supp. 466, 470, (1984), *aff'd*, 3 Fed. Cir. (T) 148, 760 F.2d 1295 (1985). Importantly here, Airbus' "Technical Definition" of the A320 describes the BSCU as landing gear, not as navigational equipment. Indeed, "Landing Gear" appears at the top of each page in this manual, and the relevant BSCU subheadings are titled "Wheel Brake System" and "Nosewheel Steering," respectively. *See* Def.'s Mem., at Ex. 1 (A320 Technical Definition).

In addition, the BSCU is not considered to be either navigational or aeronautical equipment in the aviation industry. The Master Minimum Equipment List ("MMEL"), a list developed by the FAA with participation by the aviation industry, including Airbus, classifies the BSCU as landing gear rather than navigational equipment. *See* Def.'s Mem., at Ex. 3 (Rachiele Decl. ¶ 6, referencing MMEL System No. 32). The aforementioned sources indicate that the BSCU is not a navigational device.

Plaintiff nevertheless contends that the BSCU is similar to other Airbus parts that have been previously classified under HTSUS subheading 9014.20.60. The Court, however, finds that the BSCU is easily distinguishable from other Airbus parts that fall under HTSUS subheading 9014.20.60. Plaintiff asserts that the BSCU, like the slat/flap control computer ("SFCC"), should be classified under 9014. Unlike the BSCU, however, the SFCC sets and monitors the slats and flaps of the aircraft, which in turn determines the plane's proper rate of ascent and descent. *See* HQ 087979, at 3 (Feb. 3, 1992). The SFCC, therefore, is integral to the plane's course or position. Customs specifically recognized this aspect of the SFCC in its classification ruling, noting that "devices that primarily control a plane's horizontal movements and have the capacity to correct a deviation if the aircraft is flying at a wrong angle, have been regarded as navigational instruments under the TSUS * * *." HQ 087979, at 3. In contrast to the SFCC, the BSCU does not relate to either the course or the position of the aircraft during flight. As such, the principles guiding classification of the SFCC under HTSUS subheading 9014 do not apply to the BSCU's classification.

Similarly, the Court finds unpersuasive plaintiff's next attempt to draw parallels between the previous classification of another Airbus part, the spoiler and elevator control computer ("SEC"), under HTSUS subheading 9014, and the BSCU's classification. The SEC sets, adjusts, and monitors spoilers and elevators on the Airbus A320. *See* HQ 953462 (Apr. 21, 1993). Spoilers are flaps on each wing that function as brakes to

slow the aircraft for landing, while elevators are flaps that control the pitch of the aircraft. *See id.* at 1. Importantly, both of these functions occur during the flight of the aircraft. Because the device controls pitch and rate of descent, it is not surprising that Customs found the SEC relates to the plane's course or position. Accordingly, Customs ruled that the SEC should be classified under HTSUS subheading 9014.20.60. *See id.* at 2. The BSCU functions, on the other hand, relate to braking and steering, and cannot be considered navigational functions that affect either the course or position of the aircraft in the air.

The Court, therefore, rejects plaintiff's argument that the BSCU falls under HTSUS subheading 9014.20.60.

C.

Plaintiff next contends that the BSCU should have been classified under HTSUS subheading 9031 as a measuring instrument. The Court is not persuaded.

Northwest argues that an instrument should be classified under the HTSUS according to its primary function, design, or construction. *See Trans-Atlantic Co. v. United States*, 60 CCPA 100, 103, 471 F.2d 1397, 1399 (1973). Because Northwest contends that the principle function of the BSCU is to monitor other instruments in the plane, it argues that duty-free status should be accorded under 9031. Duty-free entry is granted to parts and accessories falling under HTSUS subheading 9031.90, which includes, in relevant part, "parts and accessories" of "measuring or checking instruments, appliances and machines * * *." The principal function of the BSCU, however, is to assist the pilot in braking and steering. Indeed, the A320 Maintenance Manual plainly states that "the [BSCU] [] controls the braking of the four main wheels and the nosewheel steering." Def.'s Mem., at Ex. 1 (BSCU Maintenance Manual). The name of the part, "*Braking* and *Steering* Control Unit," also unmistakably reflects that braking and steering are the device's main functions.

Plaintiff, nevertheless, asserts that the BSCU monitors the braking function as well as other parts, and, therefore, is a measuring or checking instrument as described under 9031. In particular, plaintiff points out that the BSCU measures the brake position during landing and take-off and reports that information to the pilot and other control systems. Pl.'s Mem., at Ex. A (Nietzel Decl. ¶¶ 14, 15). While the Court agrees that the BSCU performs some measuring and monitoring functions, these functions are secondary; measuring speed and other variables is part of the BSCU's braking and steering function. The BSCU must be classified according to its primary function of braking and steering.

Plaintiff further asserts that the BSCU should be classified under HTSUS subheading 9031 because Customs has previously granted similar parts duty-free entry under this tariff heading. The Court finds that plaintiff's examples of other parts classified under HTSUS subheading 9031 are distinguishable. First, plaintiff references two classification

rulings, one involving a smoke detection control unit ("SDCU"), *see* HQ 957070 (Jan. 23, 1995), and one involving a system data acquisition concentrator ("SDAC"), *see* HQ 954175 (July 30, 1993). These two parts, though they receive signals from other computers like the BSCU, perform *only* monitoring functions. Specifically, the SDCU processes signals received from smoke detectors and relays them to the cockpit. Importantly, it does not "take any independent action regarding the condition indicated by the smoke detectors." HQ 957070, at 2. Similarly, the SDAC, after receiving signals from peripheral computers, measures the indicated malfunction against programmed guidelines. Thus, the SDAC works primarily as a measuring device and, therefore, Customs classified it under HTSUS subheading 9031. *See* HQ 954175. Unlike the SDCU and the SDAC, the measuring function of the BSCU is secondary; therefore, it cannot be properly classified as a measuring device.

Northwest next proposes that because the BSCU is a device that *assists* in measuring, it should be classified under HTSUS subheading 9031.90 (Parts and Accessories). Specifically, Northwest asserts that the BSCU is akin to the flight data entry panel ("FDEP") and the display management computer ("DMC") that Customs previously classified under HTSUS subheading 9031.90. *See* HQ 952778 (Dec. 1, 1992)(FDEP classified under HTSUS subheading 9031.90.60 as an accessory to a measuring instrument); and HQ 954194 (June 7, 1993) (DMC classified under HTSUS subheading 9031.90.60 as an accessory to a measuring instrument). Again, the BSCU is distinguishable from these parts. The FDEP does not perform any independent measuring functions, but it does work in conjunction with the flight data acquisition unit ("FDAU"). *See* HQ 952778, at 1–2. Customs classified the FDAU as a measuring or checking device under HTSUS subheading 9031. *See* HQ 952768 (Nov. 4, 1992). As a result, Customs classified the FDEP as an accessory to a measuring device (*i.e.*, the FDAU). *See* HQ 952778, at 2. Similarly, the DMC performs no measuring function itself, and performs no other function than to display data from other measuring devices, such as the SDAC. *See* HQ 954194, at 2. Customs, therefore, classified the DMC as an accessory under HTSUS subheading 9031.90. *See* HQ 954194, at 2. In short, the sole function of the FDEP and the DMC is to assist in measuring, whereas the BSCU is multi-tasked. That is, although the BSCU monitors speed and other variables, its primary functions are braking and steering. Thus, the BSCU, unlike the FDEP and the DMC, is not just an accessory to a measuring device, and, therefore, it cannot be classified under HTSUS subheading 9031.90.

D.

Finally, plaintiff argues that pursuant to the Agreement on Trade in Civil Aircraft ("ATCA"), the BSCU should be entered duty free. More concretely, plaintiff maintains that the BSCU falls within HTSUS subheading 8803.30.10 as "other parts of airplanes or helicopters for use in civil aircraft" and that such a classification confers duty-free entry. The Court finds that this argument is without merit.

Title VI of the Trade Agreement Act of 1979 codified the ATCA, which entered into force with respect to the United States on January 1, 1980. Trade Agreements Act, Pub. L. No. 96–39, 93 Stat. 144 (1979). The ATCA, in relevant part, eliminates tariffs on aircraft parts under Article 2 of the Agreement:

> *Article 2 Customs Duties and Other Charges*
>
> 2.1 Signatories agree:
>
> 2.1.1 to eliminate by January 1, 1980, or by the date of entry into force of this Agreement, all customs duties and other charges of any kind levied on, or in connection with, the importation of products classified for customs purposes under their respective tariff headings listed in the Annex, if such products are for use in civil aircraft and incorporation therein, in the course of its manufacture, repair, maintenance, rebuilding, modification or conversion;

ATCA, 31 U.S.T. 619, T.I.A.S. No. 9620 (footnote omitted). Article 9.4 of the ATCA declares that each signatory is responsible for implementing the appropriate domestic law in accordance with the Agreement. *See id.* The United States, as signatory, implemented the ATCA as part of the HTSUS as follows:

> (c) *Products Eligible for Special Tariff Treatment.* (i) (A) Programs under which special tariff treatment may be provided, and the corresponding symbols for such programs as they are indicated in the "Special" subcolumn, are as follows:
>
> * * * * * * *
>
> Agreement on Trade in Civil Aircraft * * * C
>
> * * * * * * *
>
> (iv). *Articles Eligible for Duty-Free Treatment Pursuant to the Agreement on Trade in Civil Aircraft.* Whenever a product is entered under a provision for which the rate of duty "Free (C)" appears in the "Special" subcolumn, the importer shall file a written statement, accompanied by such supporting documentation as the Secretary of the Treasury may require * * *.

General Note 3,(c)(i),(iv), HTSUS, (1990). (General Note 3(c)(iv) is now General Note 6, HTSUS.) Hence, an imported part enters the United States duty free under the ATCA only if there is a "C" in the special subcolumn under the product listing.

There is no "C" in the special subcolumn that corresponds to subheading 8803.30.00. However, this is not the end of the matter. HTSUS subheading 8803 confers duty-free treatment to all parts of civil aircraft described in subheading 8802. *See* Section XVII, Chapter 88.03 Notes. HTSUS subheading 8802 in turn carries a special "C" designation and, in general, affords duty-free treatment for all aircraft. Standing alone, this would seem to be enough to confer duty-free treatment to the BSCU under 8803.30 as a part to an aircraft that falls under subheading 8802.

Most importantly, however, there is a caveat in the relevant chapter notes that voids this simple equation. Specifically, in addition to being a part for a good that falls under subheading 8802, the chapter notes to

subheading 8803 also require that the part "must not be excluded by the provisions of the Notes to Section XVII." Section XVII, Chapter 88.03 Notes. In turn, the relevant note to Section XVII provides as follows:

> The expression "parts" and "parts and accessories" do not apply to the following articles, whether or not they are identifiable as parts of this Section: * * *
> (f) Electrical machinery or equipment (Chapter 85)

Section XVII, Section Notes, 2(f), HTSUS (1990). As already established, the BSCU is properly classified as electrical machinery under Chapter 85. *See supra* Section III.A. Therefore, the relevant section and chapter notes to the HTSUS expressly preclude duty-free treatment for the BSCU under subheading 8803, as well as under the ATCA.

Notwithstanding the HTSUS special "C" designation, and section note 2(f), Northwest asserts that the ATCA applies to all aircraft parts, including the BSCU. This argument has no merit. To apply the ATCA in this manner would contradict the plain terms of the HTSUS. If this were the case, U.S. law, *i.e.*, the HTSUS, and the ATCA, would stand in conflict with one another. The following statute dictates that U.S. law, not the ATCA, governs the outcome of such a conflict:

> No provision of any trade agreement approved by Congress under section 2503 (a) of this title, nor the application of any such provision to any person or circumstance which is in conflict with any statute of the United States shall be given effect under the laws of the United States.[11]

19 U.S.C. 2504 (a). Even if U.S. law contradicts the agreement, U.S. law must be followed. *See, e.g., Suramerica de Aleaciones Laminades, C.A. v. United States*, 10 Fed. Cir. (T) 74, 83, 966 F.2d 660, 667–68 (1992); *Algoma Steel Corp. v. United States*, 7 Fed. Cir. (T) 154, 156, 865 F.2d 240, 242 (1989). Northwest cannot apply the ATCA without reference to the relevant U.S. law. Consequently, the Court does not accept plaintiff's third alternative classification argument.

V.

CONCLUSION

For the foregoing reasons, the Court finds that Customs correctly classified the merchandise under HTSUS subheading 8537.10.00, and judgment will be entered accordingly.

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[1] The ATCA is part of section 2503(a) of title 19 of the United States Code.

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